22

5-30-0

MCC:KLM:slg:2001V00253

ORIGINAL

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MARK GARNES, Plaintiff	:	
v.	:	Civil No. 1:CV-00-0700
	:	(Caldwell, J.)
JANET RENO, et al., Defendants	:	

RECORD TO BRIEF IN SUPPORT OF THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MARTIN C. CARLSON
United States Attorney

KATE L. MERSHIMER
Assistant U.S. Attorney
SHELLEY L. GRANT
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717/221-4482

Dated: May 29, 2001

INDEX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARK GARNES,	:	
Plaintiff	:	
	:	
vs.	:	**Civil No. 1:CV-00-0700**
	:	**(Caldwell, J.)**
	:	
JANET RENO, et al.,	:	
Defendants	:	

DECLARATION OF ALICIA VASQUEZ

I, Alicia Vasquez, do hereby declare and state the following:

1. I am a Law Clerk for the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Allenwood, Pennsylvania. I have been employed with the Bureau of Prisons since August 2000.

2. As a Law Clerk with the Federal Bureau of Prisons, I have access to information maintained by the Bureau of Prisons' SENTRY computer system. Additionally, I have access to Administrative Remedy Requests filed by inmates.

3. I have reviewed the complaint filed by the Plaintiff, inmate Mark Garnes, Federal Register Number 24646-053. Essentially, the Plaintiff alleges that staff violated his right to access the court by not forwarding his legal property to him in August 1998.

4. Attached hereto as Attachment A is a true and correct copy of the Inmate Profile information for the plaintiff printed from the Bureau of Prisons' SENTRY computer system. (1 page).

5. Attached hereto as Attachment B is a true and correct copy of the Inmate History- Quarters information for the plaintiff printed from the Bureau of Prisons' SENTRY computer system. (2 pages).

I declare that any and all records attached to this declaration are true and accurate copies of records maintained in the ordinary course of business by the Federal Bureau of Prisons. I further declare that the foregoing is true and correct to the best of my knowledge and belief, and is given under penalty of perjury pursuant to 28 U.S.C. §1746.

Executed this 10th day of May, 2001.

Alicia Vasquez

ALICIA VASQUEZ
Law Clerk
Federal Bureau of Prisons
Consolidated Legal Center - Allenwood
White Deer, Pennsylvania 17887

Garnes v. Reno, et al.
Civil Action Number 1:CV-00-0700
Middle District of Pennsylvania

Declaration of Alicia Vasquez, Law Clerk/Honors Attorney

Attachment A

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  ALFDF  535.03 *                INMATE PROFILE                *     04-16-2001
PAGE 001 OF 001                                                     08:39:55
            24646-053             REG
REGNO: 24646-053                   FUNCTION: PRT DOB/AGE.: 05-15-1963 / 37
NAME.: GARNES, MARK                              R/S/ETH.: B/M/O
RSP..: FTD-FORT DIX FCI                          MILEAGE.: 98 MILES
PHONE: 609-723-1100          FTS: 700-866-6000
 PROJ REL METHOD: GOOD CONDUCT TIME REL (CCCA)   FBI NO..: 450634V3
 PROJ REL DATE..: 06-03-2010                     INS NO..: N/A
 PAR ELIG DATE..: N/A                            SSN.....: 062584240
 PAR HEAR DATE..:                                DETAINER: NO        CMC..: YES
OFFN/CHG RMKS: 21 841 POSS WITD COCAINE BASE; 300 MOS, 5 YR SUPV.
  FACL CATEGORY   - - - - -  CURRENT ASSIGNMENT - - - - - -  EFF DATE  TIME
  FTD  ADM-REL    A-DES      DESIGNATED, AT ASSIGNED FACIL  04-18-2000 1000
  FTD  COR COUNSL 5812 A-L   C. SMITH-CCC-5812 X636         04-28-2000 1106
  FTD  CASE MGT   PROG RPT   NEXT PROGRESS REPORT DUE DATE  11-23-2002 1425
  FTD  CASE MGT   RPP NEEDS  RELEASE PREP PGM NEEDS         09-01-1996 0952
  FTD  CASE MGT   V94 CVB913 V94 CURR VIOL BEFORE 91394     02-22-1996 1722
  FTD  CASE MGT   WAP-EDNY   WRIT AD PROS TO EASTERN NY     08-12-1998 1600
  FTD  CASEWORKER 5812 A-L   R. BOATWRIGHT-CSW-5812 X625    04-28-2000 1107
  FTD  CUSTODY    IN         IN CUSTODY                     01-19-1989 0603
  FTD  DRUG PGMS  DRG E COMP DRUG EDUCATION COMPLETED       05-10-1995 0900
  FTD  DRUG PGMS  DRG I NONE NO DRUG INTERVIEW REQUIRED     12-01-2000 1121
  FTD  EDUC INFO  ESL HAS    ENGLISH PROFICIENT             08-25-1991 1451
  FTD  EDUC INFO  GED HAS    COMPLETED GED OR HS DIPLOMA    12-20-1995 1752
  FTD  FIN RESP   COMPLT     FINANC RESP-COMPLETED          12-10-1992 1037
  FTD  LEVEL      LOW        SECURITY CLASSIFICATION LOW    03-15-2000 0926
  FTD  MED DY ST  REG DUTY   NO MEDICAL RESTR--REGULAR DUTY 11-10-1998 1845
  FTD  MED DY ST  YES F/S    CLEARED FOR FOOD SERVICE       08-30-1999 1518
  FTD  PGM REVIEW MAY        MAY PROGRAM REVIEW             05-03-2001 1648
  FTD  QUARTERS   Q02-393U   HOUSE Q/RANGE 02/BED 393U      04-28-2000 1154
  FTD  RELIGION   RASTA      RASTAFARIAN                    11-22-1999 1113
  FTD  UNIT       UNIT 5     M. CARROLL- UNIT MGR X618      04-18-2000 1000
  FTD  WAITNG LST W COMP VT  COMPUTER VT CLASS WEST         11-09-2000 1131
  FTD  WRK DETAIL WELLNESS W WELLNESS PROGRAM - FCI WEST    05-02-2000 0001

G0000       TRANSACTION SUCCESSFULLY COMPLETED
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Garnes v. Reno, et al.
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Declaration of Alicia Vasquez, Law Clerk/Honors Attorney

Attachment B

ALFDF 531.01 * INMATE HISTORY * 04-16-2001
PAGE 001 * QUARTERS * 08:39:48

REG NO..: 24646-053 NAME....: GARNES, MARK
CATEGORY: QTR FUNCTION: PRT FORMAT:

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
FTD	Q02-393U	HOUSE Q/RANGE 02/BED 393U	04-28-2000 1154	CURRENT
FTD	Q02-161U	HOUSE Q/RANGE 02/BED 161U	04-28-2000 1116	04-28-2000 1154
FTD	W02-165L	HOUSE W/RANGE 02/BED 165L	04-18-2000 1826	04-28-2000 1116
FTD	U01-001L	HOUSE U/RANGE 01/BED 001L	04-18-2000 1000	04-18-2000 1826
LEW	I02-201L	HOUSE I/RANGE 02/BED 201L	04-13-2000 1758	04-18-2000 0553
LEW	R01-001L	HOUSE R/RANGE 01/BED 001L	04-13-2000 1709	04-13-2000 1758
ALM	C05-104L	HOUSE C/RANGE 05/BED 104L	02-15-2000 0817	04-13-2000 1534
ALM	C05-104U	HOUSE C/RANGE 05/BED 104U	10-21-1999 1424	02-15-2000 0817
ALM	Z01-021UAD	HOUSE Z/RANGE 01/BED 021U AD	10-01-1999 2204	10-21-1999 1424
ALM	Z01-011UAD	HOUSE Z/RANGE 01/BED 011U AD	09-10-1999 1935	10-01-1999 2204
ALM	Z01-008UAD	HOUSE Z/RANGE 01/BED 008U AD	08-20-1999 1349	09-10-1999 1935
ALM	Z01-015UAD	HOUSE Z/RANGE 01/BED 015U AD	08-19-1999 1500	08-20-1999 1349
BRO	F10-006L	HOUSE F/RANGE 10/BED 006L	01-30-1999 1400	08-19-1999 0556
BRO	4S	4 SOUTH PRE-TRIAL MALE	08-12-1998 1710	01-30-1999 1400
BRO	R&D	RECEIVING & DISCHARGE	08-12-1998 1313	08-12-1998 1710
ALM	Z01-006LAD	HOUSE Z/RANGE 01/BED 006L AD	08-06-1998 1402	08-12-1998 0642
ALM	Z01-006LAD	HOUSE Z/RANGE 01/BED 006L AD	07-16-1998 1325	08-06-1998 1402
ALM	C06-123L	HOUSE C/RANGE 06/BED 123L	06-10-1998 1114	07-16-1998 1325
ALM	3B	B SIDE OF UNT 3	02-01-1996 0948	06-10-1998 1114
ALM	ADM DET	FCI, ALW SEG	01-31-1996 1600	02-01-1996 0948
SCH	ADM DET	ADMINISTRATIVE DETENTION	01-30-1996 1724	01-31-1996 0754
SCH	DIS SEG	DISCIPLINARY SEGREGRATION	01-17-1996 1037	01-30-1996 1724
SCH	ADM DET	ADMINISTRATIVE DETENTION	12-22-1995 1513	01-17-1996 1037
SCH	1A	QUARTERS 1A	06-05-1995 1439	12-22-1995 1513
SCH	R & D	RECEIVING & DISCHARGE	06-05-1995 1130	06-05-1995 1439
LEW	D-3	D-3 CELLHOUSE	09-10-1992 1020	06-05-1995 0810
LEW	D-2	D-2 CELLHOUSE	02-13-1992 1600	09-10-1992 1020
LEW	D-3	D-3 CELLHOUSE	02-07-1992 1600	02-13-1992 1600
LEW	ADM DET	ADMINISTRATIVE DETENTION	10-08-1991 2135	02-07-1992 1600
LEW	D-1	D-1 CELLHOUSE	01-31-1991 1600	10-08-1991 2135
LEW	I-1	I-1 CELLROOM	01-17-1991 1858	01-31-1991 1600
LEW	R/D	RECEIVING & DISCHARGE	01-17-1991 1741	01-17-1991 1858
NYM	5N	FIFTH FLOOR NORTH	11-19-1990 0515	01-17-1991 0524
NYM	R&D	RECEIVING AND DISCHARGE	11-19-1990 0054	11-19-1990 0515
OTV	UNIT 3A	3A	10-18-1990 1905	11-19-1990 0013
OTV	ADM DET	ADMIN DETENTION	09-14-1990 1040	10-18-1990 1905
OTV	UNIT 3A	3A	09-14-1990 1039	09-14-1990 1040
OTV	R&D	RECEIVING AND DISCHARGE	09-14-1990 0819	09-14-1990 1039
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	09-12-1990 1919	09-14-1990 0025
NYM	5N	FIFTH FLOOR NORTH	08-10-1990 0339	09-12-1990 1919
NYM	7N	SEVENTH FLOOR NORTH	08-10-1990 0147	08-10-1990 0339

G0002 MORE PAGES TO FOLLOW . . .

ALFDF 531.01 * INMATE HISTORY * 04-16-2001
PAGE 002 OF 002 * QUARTERS * 08:39:48

REG NO..: 24646-053 NAME....: GARNES, MARK
CATEGORY: QTR FUNCTION: PRT FORMAT:

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
NYM	R&D	RECEIVING AND DISCHARGE	08-10-1990 0038	08-10-1990 0147
OTV	UNIT 4A	4A	08-01-1990 0800	08-10-1990 0023
OTV	R&D	RECEIVING AND DISCHARGE	08-01-1990 0554	08-01-1990 0800
NYM	5N	FIFTH FLOOR NORTH	07-27-1990 2039	08-01-1990 0026
NYM	9N	NINTH FLOOR NORTH	07-27-1990 0337	07-27-1990 2039
NYM	R&D	RECEIVING AND DISCHARGE	07-27-1990 0123	07-27-1990 0337
OTV	UNIT 4A	4A	06-27-1990 0902	07-27-1990 0033
OTV	R&D	RECEIVING AND DISCHARGE	06-27-1990 0652	06-27-1990 0902
NYM	7N	SEVENTH FLOOR NORTH	05-10-1990 0913	06-27-1990 0031
NYM	7S	SEVENTH FLOOR SOUTH	04-17-1990 1014	05-10-1990 0913
NYM	9S SEG	9-S DISCIPLINARY SEGREGATION	02-13-1990 1532	04-17-1990 1014
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	01-04-1990 0604	02-13-1990 1532
NYM	R&D	RECEIVING AND DISCHARGE	01-04-1990 0532	01-04-1990 0604
OTV	ADM DET	ADMIN DETENTION	12-26-1989 1031	01-04-1990 0139
OTV	UNIT 3B	3B	11-15-1989 1053	12-26-1989 1031
OTV	R&D	RECEIVING AND DISCHARGE	11-15-1989 0725	11-15-1989 1053
NYM	11S	11 SOUTH	11-02-1989 2041	11-15-1989 0519
NYM	7N	SEVENTH FLOOR NORTH	09-14-1989 1627	11-02-1989 2041
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	07-28-1989 2107	09-14-1989 1627
NYM	5N	FIFTH FLOOR NORTH	06-05-1989 2044	07-28-1989 2107
NYM	9S SEG	9-S DISCIPLINARY SEGREGATION	05-31-1989 1309	06-05-1989 2044
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	05-23-1989 2234	05-31-1989 1309
NYM	7S	SEVENTH FLOOR SOUTH	05-23-1989 2044	05-23-1989 2234
NYM	5N	FIFTH FLOOR NORTH	05-01-1989 1140	05-23-1989 2044
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	04-25-1989 1357	05-01-1989 1140
NYM	7S	SEVENTH FLOOR SOUTH	04-25-1989 1049	04-25-1989 1357
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	04-21-1989 2047	04-25-1989 1049
NYM	5N	FIFTH FLOOR NORTH	04-21-1989 0857	04-21-1989 2047
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	04-06-1989 1316	04-21-1989 0857
NYM	5N	FIFTH FLOOR NORTH	03-28-1989 1455	04-06-1989 1316
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	03-27-1989 1537	03-28-1989 1455
NYM	5N	FIFTH FLOOR NORTH	01-24-1989 2119	03-27-1989 1537
NYM	11S	11 SOUTH	01-19-1989 1835	01-24-1989 2119
NYM	R&D	RECEIVING AND DISCHARGE	01-19-1989 0603	01-19-1989 1835
OTV	UNIT 3B	3B	01-06-1989 1209	01-19-1989 0227
OTV	R&D	RECEIVING AND DISCHARGE	01-06-1989 0730	01-06-1989 1209
NYM	5N	FIFTH FLOOR NORTH	11-28-1988 1345	01-06-1989 0917
NYM	9S DET	9-S ADMINISTRATIVE DETENTION	11-14-1988 1624	11-28-1988 1345
NYM	11S	11 SOUTH	08-12-1988 2003	11-14-1988 1624
NYM	9N	NINTH FLOOR NORTH	08-11-1988 2341	08-12-1988 2003
NYM	R&D	RECEIVING AND DISCHARGE	08-11-1988 1934	08-11-1988 2341

G0000 TRANSACTION SUCCESSFULLY COMPLETED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARK GARNES,	:	
Plaintiff	:	
	:	
vs.	:	**Civil No. 1:CV-00-0700**
	:	**(Caldwell, J.)**
	:	
JANET RENO, et al.,	:	
Defendants	:	

DECLARATION OF CHARLES FEGLEY

I, Charles Fegley, hereby make the following declaration:

1. I am currently employed by the United States Department of Justice, Federal Bureau of Prisons, as an Inmate Systems Officer at F.C.I. Allenwood. I have been employed by the Bureau of Prisons since August 1989. I have held the position of Inmate Systems Officer at F.C.I. Allenwood since May 1993.

2. I am aware of the allegations contained in the above-captioned complaint in which I am named as a defendant in both my individual capacity and in my official capacity. The Plaintiff, inmate Mark Garnes, register number 24646-053, alleges that I failed to mail all of his legal materials to him while he was on writ at the Metropolitan Detention Center (M.D.C.) Brooklyn. The Plaintiff further alleges that I am the property officer who should have mailed his legal materials to him at M.D.C. Brooklyn.

3. In the course of my employment, I have access to documents, files, and electronic records pertaining to federal inmates, including Inmate Personal Property Record forms and UPS mail record forms relating to inmate property mailed from F.C.I. Allenwood and retained at F.C.I. Allenwood. In addition, I have access to Bureau of Prisons' policy, including Bureau-wide Program Statements and institution supplements relating to F.C.I. Allenwood.

4. In connection with responding to this action, I reviewed available property records relating to the Plaintiff. These records reveal that on August 11, 1998, I was assigned to work in the institution's Receiving and Discharge area. Specifically, my duties included processing inmates in or out of the institution; receiving and sending inmate property; preparing inmates for court appearances ("dress-outs"); and other duties as assigned.

5. At approximately 10:00 a.m., the Plaintiff reported to Receiving and Discharge in order to pack his property since he was scheduled to depart F.C.I. Allenwood on writ to M.D.C. Brooklyn.

6. I conducted an inventory of the Plaintiff's property in the Plaintiff's presence. As I inventoried each item, I recorded

the item on Bureau of Prisons Form BP-383 ("Inmate Personal Property Record"). With the exception of two items (five soft cover reading books and two photo albums), all of the Plaintiff's items were marked as "stored". Since the Plaintiff was not a permanent release from the institution (he was a temporary release since he was only going out on writ), he was not allowed to bring his personal property with him. This is in accordance with established Bureau of Prisons policy (Institution Supplement ALM 5800.08 E, entitled Receiving and Discharge Manual, paragraph 5.f, and Bureau of Prisons Program Statement 5800.12, entitled Receiving and Discharge Manual, paragraph 310). I have attached a copy of this Institution Supplement and Program Statement to my declaration as Attachment A.

7. Even though the Plaintiff would have been allowed to bring "essential legal materials" with him in accordance with the Receiving and Discharge Manual, the Plaintiff elected to have this property stored. This was indicated by marking "S" for "stored" on the inventory sheet. Further, the Plaintiff verified the accuracy of this action by signing Block #10 of the inventory form. I have attached a copy of the inventory form to my declaration as Attachment B.

8. Contrary to the Plaintiff's assertions, I did not refuse to allow the Plaintiff to take his legal materials with him. If the Plaintiff had requested to bring his legal materials with him, I would have separated those materials from the remainder of his property, completed a manifest for the staff members from the bus crew to sign (to document they received the material) and I would have placed a copy of the manifest in the Plaintiff's file.

9. Since the Plaintiff signed the form stating that the property (including his legal materials) was to be stored, I packed the property and it was placed in storage (except for the two items which the Plaintiff had indicated should be mailed to an address he had provided). The Plaintiff was then given a copy of the inventory form for his records.

10. A further review of available records indicates that on August 26, 1998, I received a call from the Plaintiff's Unit Manager at M.D.C. Brooklyn requesting that the Plaintiff's legal materials be forwarded to the Plaintiff at M.D.C. Brooklyn. Out of an abundance of caution, I mailed **all** of the Plaintiff's property to M.D.C. Brooklyn. Before I mailed the property, I changed the inventory sheet from "S" for "stored" to "M" for "mailed". I also noted in Block #8 of the inventory that "all property was mailed to M.D.C. Brooklyn".

I have attached a copy of the updated inventory sheet to my declaration as Attachment C.

11. On the following day (August 27, 1998) the personal property was mailed via UPS to M.D.C. Brooklyn. I have attached a copy of the UPS shipping record to my declaration as Attachment D.

12. The UPS Shipping Record clearly indicates that three boxes were shipped to M.D.C. Brooklyn with the reference of "Garnes" and the Plaintiff's federal register number.

13. Although I do not recall the exact date, I do recall that at some point the Plaintiff's property was refused by staff at M.D.C. Brooklyn and the Plaintiff's property, or portions thereof, was returned to F.C.I. Allenwood. I was **not** involved in this refusal. Since the Plaintiff was still on writ and he would eventually return to F.C.I. Allenwood, this property was once again stored.

14. Thereafter, in mid-October 1998, I was once again contacted by staff from M.D.C. Brooklyn and I was asked to send the Plaintiff's property back to M.D.C. Brooklyn. To the best of my recollection, I was not actually involved in re-mailing the Plaintiff's property to M.D.C. Brooklyn staff. In fact, to the best of my recollection, I was not involved with handling

the Plaintiff's property again.

15. The only other personal involvement I can recall is after the Plaintiff returned from writ, he approached me and asked me why I hadn't mailed his property to him. I then retrieved a copy of the UPS sheet which showed that I had mailed the property to M.D.C. Brooklyn and I showed the form to the Plaintiff. The Plaintiff stated words to the effect that he agreed that I had sent his property but that other staff (i.e. M.D.C. Brooklyn staff) didn't do their jobs.

16. In connection with responding to this action, I contacted staff at MDC Brooklyn and asked them for any records they had regarding the Plaintiff's property while he was at MDC Brooklyn on writ. I received several forms which are each described below.

17. I received an Inmate Personal Property Record dated September 3, 1998 signed by the Plaintiff indicating that he received 18 inches of legal materials. I have attached a copy of this record to my declaration at Attachment E. This property form shows that on September 3, 1998 MDC Brooklyn received incoming packages of the Plaintiff's property and allowed the Plaintiff to keep the legal materials, as they are marked "K" for "keep in possession." The remainder of the Plaintiff's property was

sent back to his designated institution, FCI Allenwood. The notation in block 7(e) of the record states "Rest of property returned back to institution (ALM). Inmate here on writ." The record further indicates that the other property was shipped via UPS, as the UPS tracking numbers are pasted in block 7(e).

18. This form was signed by the Plaintiff in block 10 next to the words, "I have today reviewed the property returned to me." Section 10,which the Plaintiff signed under, reads in part, "The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments." The Plaintiff signed and dated the form indicating that he had received 18 inches of legal materials and that the remainder of his property would be shipped back to his designated institution, FCI Allenwood. The Plaintiff initialed in block 8 indicating that no individual item he owned was worth more than one hundred dollars.

19. In response to my request for documentation, MDC Brooklyn also sent me a "Request- Authorization to Mail Inmate Package" dated March 3, 1999. I have attached a copy of this request to my declaration at Attachment F. This form indicates that on March 3, 1998, the Plaintiff requested to have his legal materials mailed to Mr. Tyrone L. Williams in the Bronx, New York. The Plaintiff signed this request and dated it March 3, 1998.

20. In response to my request for documentation, MDC Brooklyn sent me another "Request- Authorization to Mail Inmate Package." This one is dated June 17, 1999 and is attached to my declaration as Attachment G. This form indicates that on June 17, 1999 the Plaintiff requested to have his "books, **legal material**, photos, personal papers, mail" (emphasis added) shipped to Mr. Tyrone L. Williams in the Bronx, New York. This form indicates that the property was mailed from MDC Brooklyn to the Bronx.

21. Finally, I declare that at no time did I intentionally violate any of the Plaintiff's rights. My actions were done in accordance with established Bureau of Prisons policies and existing case law.

I declare that any and all records attached to this declaration are true and accurate copies of records maintained in the ordinary course of business by the Federal Bureau of Prisons. I further declare that the foregoing is true and correct to the best of my knowledge and belief, and is given under penalty of perjury pursuant to 28 U.S.C. §1746.

C. T. Fegley

CHARLES FEGLEY
Inmate Systems Officer
F.C.I. Allenwood
White Deer, Pennsylvania 17887

5/10/01

DATE

Garnes v. Reno, et al.
Civil Action Number 1:CV-00-0700
Middle District of Pennsylvania

Declaration of Charles Fegley

Attachment A

U. S. Department of Justice

Federal Bureau of Prisons

NUMBER: ALM 5800.08E

DATE: August 3, 1998

SUBJECT: Receiving and Discharge Manual

Federal Correctional Complex
Federal Correctional Institution - Allenwood
White Deer, PA 17887

Institution Supplement

1. **PURPOSE:** To supplement Program Statement 5800.08, Receiving and Discharge Manual. This institution supplement establishes local guidelines for receiving and discharging inmates and handling inmate personal property at FCI, Allenwood.

2. **DIRECTIVES AFFECTED:**

   A. Directives Rescinded

   Institution Supplement ALM 5800.08D, Receiving and Discharge Manual, dated April 9, 1997.

   B. Directives Referenced

   Program Statement. 5800.08, Receiving and Discharge Manual, dated June 15, 1993.

   Program Statement. 5800.10, Mail Management Manual, dated November 3, 1995.

   Program Statement 5800.07, Inmate Systems Management Manual dated December 24, 1991.

   Program Statement 5580.05, Inmate Personal Property, dated September 30, 1996.

   Institution Supplement 5580.05, Inmate Personal Property, dated December 18, 1996.

3. **STANDARDS REFERENCED:** American Correctional Association 3rd Edition Standards for Adult Correctional Institutions: 3-4092, 3-4093, 3-4100, 3-4101, 3-4272, 3-4279, and 3-4393.

4. **RESPONSIBILITIES:** Inmate Systems personnel are responsible for the physical control of any new commitment or transfer while in the Receiving and Discharge area and are responsible for the inmate's personal property prior to its issuance or mailing. ISM personnel will be responsible for identifying new commitments as they arrive during regularly assigned hours. A Lieutenant is

responsible for identifying and processing incoming or outgoing inmates during times when ISM personnel are not on duty. Correctional Services shall provide support, i.e., transporting inmates to and from the R&D area and performing strip searches of inmates.

5. **PROCEDURES:**

A. Receiving and Discharge will hold open house on Tuesdays and Thursdays from 11:30 A.M. to 12:30 P.M. in conjunction with Mail Room and Record Office open house. The inmates will enter through R&D and will be placed in a holding cell. They will be called out as ISM staff are available to assist them with their concerns. Inmate Systems staff will tour the Special Housing Unit at least once a week to answer inmate concerns.

B. Generally, inmate movement into and out of the institution will be through the Control Center Sally-Port. The transport vehicle will be processed through the rear gate for movement with no more than five inmates. Inmates will be escorted through the outside Administration Building to Receiving and Discharge by Inmate Systems staff. After identification of each inmate is confirmed, the inmates will be escorted into Receiving and Discharge. If it is necessary for a bus to enter the institution, it will be escorted by Correctional Services staff to the circular drive of R&D.

C. Prior to inmates arriving, the Inmate Systems Officer will shake down the holding cells in R&D. Once inside, the restraints will be removed from the inmates by the bus crew or escorting law enforcement officer. The inmates will then be searched with a hand-held metal detector and then be placed into the holding cell(s). The bus crew will be responsible for strip searching the outgoing inmates and dressing them in bus clothes.

D. Inmate Systems staff will begin processing the incoming inmates. Inmates will be strip- searched and then searched with a hand-held metal detector. FBI fingerprint cards will be notated for scars, marks and tattoos, and the inmates will be dressed in appropriate institution clothing. Appropriate fingerprints and photos will be taken after strip-search procedures are completed. After each inmate is processed, he will be placed in a clean holding cell to await social and medical screening. After all inmates have been moved from the "dirty" holding cell to the "clean" holding cell, the "dirty" holding cell will be searched for contraband. Upon completion of the medical and social screenings, the inmates will be escorted by Correctional Services staff to the appropriate quarters.

Distribution of photo identification cards is as follows:

2 3x5's to Lieutenants Office (1 for visiting, 1 for Lt.'s file)
2 3x5's to Control Center (1 for detail pouch, 1 for Control file)
1 3x5 to Record Office
1 5x8 to Unit Officer (bedbook card)
1 5x8 to Warden

E. Incoming inmate personal property will be logged in the R&D property log book, recording the date received and issued, inmate name, register number, and certified number. Arrangements will be made to issue the property to the inmate as soon as possible after receipt by R&D staff.

F. Outgoing inmate personal property will be inventoried prior to the inmate's permanent release or transfer to another institution. Personal property for inmates transferring to another institution will be mailed via United Parcel Service. Inmates releasing from their federal sentence will be required to carry all property with them, unless they wish to mail the property at their own expense prior to the release date. Inmates who leave the institution on Interstate Agreement, Federal or State writ, or to a federal medical facility will have their property stored in R&D until they return.

6. **ISSUING OFFICE:** Inmate Systems

Jake Mendez, Warden

U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI: CPD
NUMBER: 5800.12
DATE: CN-01, 8/17/98
SUBJECT: Receiving and Discharge Manual

1. PURPOSE AND SCOPE. To establish procedures for receiving and discharging inmates and for handling inmate personal property.

The Receiving and Discharge (R&D) section of the Inmate Systems Management Department has historically maintained the responsibility for the movement of inmates and inmate property in and out of Bureau of Prisons institutions. Procedures for R&D functions were previously contained in numerous Bureau directives. This Manual places R&D procedures in one directive.

2. PROGRAM OBJECTIVES. The expected results of this program are:

a. The operation of all Receiving and Discharge areas of Inmate Systems Management will be safe, secure, and uniform.

b. Inmates will be committed and discharged accurately and all inmate personal property will be processed without introducing contraband into the institution.

3. DIRECTIVES AFFECTED

a. Directive Rescinded

PS 5800.08	Receiving and Discharge (6/15/93)

b. Directives Referenced

PS 1210.17	Internal Affairs, Office of (8/4/97)
PS 1232.05	Personal Computers (11/10/97)
PS 1600.07	Occupational Safety and Environmental Health Manual (5/30/96)
PS 2000.02	Accounting Management Manual (10/15/86)
PS 4400.03	Property Management Manual (2/27/96)
PS 4510.04	Contributions, Inmate (10/28/92)
PS 5100.06	Security Designation & Custody Classification Manual (6/7/96)
PS 5230.05	Grooming (11/4/96)

310. RELEASE FOR COURT APPEARANCES (WRIT, IAD, ETC.)

Inmates removed from the institution for court proceedings shall be permitted to retain essential legal material, appropriate clothing for court purposes, and personal hygiene items. The * institution shall provide a set of clothing which shall allow * a neat and clean appearance in court. Inmates ordinarily shall be permitted to take prescription eyeglasses, dentures, prescribed medical devices, or medication. Property removed from the institution with the inmate should normally fit in a 10 x 12 x 15 inch box. Other personal property shall be stored as discussed elsewhere in this Manual. (See Chapter 4, Section 407, Religious Items.)

Inmates having money in their Trust Fund Accounts may be permitted to take a reasonable amount with them, as determined by their unit staff (ordinarily no more than $50). Staff may "close out" the inmate's Trust Fund Account when it is known that the inmate shall not return to the institution.

Inmates not scheduled to return from court the same day of release must complete a Disposition of Mail While Inmate is Released Temporarily on Writ (BP-S398), before leaving the institution. R&D staff are responsible for ensuring this is accomplished (see the Program Statement on Correspondence and the Mail Management Manual for further information).

311. TEMPORARY TRANSFER TO A LOCAL MEDICAL FACILITY

Inmates transferring to a local medical facility ordinarily shall be permitted to take prescription eyeglasses, dentures, prescribed medical devices or medication. Other personal property and funds ordinarily are not allowed.

312. RELEASE TO U.S. MARSHALS OR OTHER LAW ENFORCEMENT AGENT

Bureau staff must provide information regarding the inmate's criminal and medical history as well as institutional behavior to transporting officials. This information is critical in maintaining custody and control of the inmate enroute to the new destination. It also provides for the welfare of the inmate and enhances an atmosphere of cooperation with the transporting agency.

The Program Statements on Releasing Inmates to Transporting Officers via Escort or Bus and Transferring Inmates to State Agents provide additional instructions on the subject.

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Civil Action Number 1:CV-00-0700
Middle District of Pennsylvania

Declaration of Charles Fegley

Attachment B

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record—
Institution: ATW

1. Name: Barnes, Mark	2. Register Number: 24646-053	3. Unit: 3B/5	4. Date and Time of Inventory 8/11/98 1000

5. Purpose of Inventory (check one that applies): Date and Time of Action: 8/11/98 1000
a.___ Admission b.___ Hospital c.X Writ d.___ Transfer e.___ Detention f.___ Release
g.___ Incoming package h.___ Other (specify)

6. Disposition (Disp.)
D – Donated M – Mail S – Storage
K – Keep in Possession
C – Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
	Batteries	
	Belt	
	Billfold	
5	Books, reading hard___, soft X	M
	Books, religious hard___, soft___	
	Brassiere	
1	Cap, Hat	S
	Coat	
	Coins	
1	Comb	
1	Combination lock	S
	Dress	
	Driver's license	
	Earplugs	
1	Eyeglass case	S
1	Eyeglasses	S
	Gloves	
	Hair brush/pick	
	Handkerchief	
	Jacket	
1	Jogging suit	S
1	Legal Materials	S
	Letters	
1	Magazines	S
1	Mirror	S
1	Nail Clippers	S
2	Pant/slacks	S
2	Pen, ballpoint	S
1	Pencils	S
1	Personal papers	S
2	Photo album	M
	Photos	

#	Article	Disp.
	Plastic spoon, cup	
	Playing cards	
	Purse	
	Radio (w/earplug)	
	Religious medals	
	Ring	
	Shirt/blouse	
	Shoes	
	Shoes, shower	
	Shoes, slippers	
1	Shoes, tennis Nike	S
2	Shorts	S
	Skirt	
	Slip	
1	Social security card	
2	Socks	S
	Socks, athletic	
	Stamps	
	Stockings	
	Sunglasses	
1	Sweater	S
1	Sweat pants	S
1	Sweat shirt	S
	Trophy	
5	T-Shirts	S
2	Underwear	S
	Watch/watch band	
	Wig	
1	Robe	S
1	Bowl	S
1	Mug	S
1	Shakers	S

b. Hygiene, etc.

#	Article	Disp.
	Dental floss	
	Dentures	
1	Deodorant	S
1	Hair oil	S
	Noxzema	
	Powder	
	Razor	
	Razor blades	
	Shampoo	
	Shaving lotion	
	Skin lotion	
	Soap	
	Soap dish	
1	Toothbrush + case	S
1	Toothpaste	S
1/2	Tide	S
1	Oil	S
1	Cologne	S

c. Hobbycrafts

#	Article	Disp.
8	Wraps	S
3	Bands	S
1	Hanger	S
1	Scissors	S

d. Food/Tobacco Items

#	Article	Disp.
	Canned tobacco	
	Chewing tobacco	
	Cigarettes	
	Cigars/snuff	
	Coffeemate	
	Cold drink mix, soda	
	Fruit	
	Honey, Hi-protein	
	Instant chocolate	
	Instant coffee	
	Instant tea	
	Pipe cleaner/filters	
	Pipes	

e. Miscellaneous (List any damaged property and from where it was received: e.g., U.S. Marshal)

8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate

X No individual item over $100.00

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee):
I. Williams 1139 Clay Ave #21 Bronx 10456

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accu-
Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this
ory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the
of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of
he inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the
that there is missing or damaged property, this information should be noted under Comments.

of Receiving Officer: [signature] Date: 8/11/98 Time: 10
Printed Na roperty returned to me. Signature of Inmate: [signature] Reg. No.: 24646-053 Date: 8/11/98 Time: 101
I have today revie ase of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the
ventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or
uld be noted under Comments.

ate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's

Original — Inmate's Central
USP LVN

Date: Tim
Signature of Inmate Reg. No.: Date:
Special Housing

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Middle District of Pennsylvania

Declaration of Charles Fegley

Attachment C

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record—
Institution: ATW

1. Name:	2. Register Number:	3. Unit:	4. Date and Time of Inventory
Barnes, Mark	24646-053	3B/5	8/11/98 1000

5. Purpose of Inventory (check one that applies): Date and Time of Action: 8/11/98 1000
a.___ Admission b.___ Hospital c.X Writ d.___ Transfer e.___ Detention f.___ Release
g.___ Incoming package h.___ Other (specify)

6. Disposition (Disp.)
D – Donated M – Mail S – Storage
K – Keep in Possession
C – Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
___	Batteries	___
___	Belt	___
___	Billfold	___
5	Books, reading Home hard___, soft 2	M
___	Books, religious hard___, soft___	___
___	Brassiere	___
2	Cap, Hat	M
___	Coat	___
___	Coins	___
1	Comb	M
1	Combination lock	M
___	Dress	___
___	Driver's license	___
___	Earplugs	___
1	Eyeglass case	M
1	Eyeglasses	M
___	Gloves	___
___	Hair brush/pick	___
___	Handkerchief	___
___	Jacket	___
1	Jogging suit	M
24	Legal Materials	M
___	Letters	___
___	Magazines	___
1	Mirror	M
1	Nail Clippers	M
___	Pant/slacks	___
2	Pen, ballpoint	M
1	Pencils	M
1	Personal papers	M
2	Photo album Home	M
___	Photos	___

#	Article	Disp.
___	Plastic spoon, cup	___
___	Playing cards	___
___	Purse	___
___	Radio (w/earplug)	___
___	Religious medals	___
___	Ring	___
___	Shirt/blouse	___
___	Shoes	___
___	Shoes, shower	___
1	Shoes, slippers	___
1	Shoes, tennis Nike	M
2	Shorts	M
___	Skirt	___
___	Slip	___
1	Social security card	___
8	Socks	___
___	Socks, athletic	M
___	Stamps	___
___	Stockings	___
___	Sunglasses	___
1	Sweater	___
1	Sweat pants	M
1	Sweat shirt	M
3	Trophy	M
8	T-Shirts	M
___	Underwear	M
___	Watch/watch band	___
___	Wig	___
1	Robe	M
1	Bowl	M
1	Jug	M
1	Steakers	M

b. Hygiene, etc.

#	Article	Disp.
___	Dental floss	___
___	Dentures	___
1	Deodorant	M
3	Hair oil	M
___	Noxzema	___
___	Powder	___
___	Razor	___
___	Razor blades	___
___	Shampoo	___
___	Shaving lotion	___
___	Skin lotion	___
___	Soap	___
___	Soap dish	___
1	Toothbrush Crest	M
1	Toothpaste	M
2	Tide	M
1	oil	M
1	Cologne	M

c. Hobbycrafts

#	Article	Disp.
8	Wraps	M
3	Bands	M
1	Heater	M
1	Scissors	M

d. Food/Tobacco Items

#	Article	Disp.
___	Canned tobacco	___
___	Chewing tobacco	___
___	Cigarettes	___
___	Cigars, snuff	___
___	Coffeemate	___
___	Cold drink mix, soda	___
___	Fruit	___
___	Honey, Hi-protein	___
___	Instant chocolate	___
___	Instant coffee	___
___	Instant tea	___
___	Pipe cleaner/filters	___
___	Pipes	___

e. Miscellaneous (List any damaged property and from where it was received: e.g., U.S. Marshal)

8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate
N.S. 8/26/94 All Property Mailed to MDC Brooklyn Per Request (Mr Baggot)	

X No individual item over $100.00

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee):
T. Williams 1139 Clay Ave #21 Bronx 10456

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accuracy. Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this inventory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Receiving Officer: C. Fegley Fegley Date: 8/11/98 Time: 1015

I have today reviewed the property returned to me. Signature of Inmate: [signature] Reg. No.: 24646-053 Date: 8/11/98 Time: 1015

b. Upon release of the inmate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's housing. The inmate certifies release of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the inmate claims a discrepancy in the inventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Releasing Officer: _____ Date: _____ Time: _____

I have today reviewed the property returned to me. Signature of Inmate _____ Reg. No.: _____ Date: _____ Time: _____

Original — Inmate's Central File; CC: Inmate, R & D, Special Housing

BP-383(58)

Garnes v. Reno, et al.
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Middle District of Pennsylvania

Declaration of Charles Fegley

Attachment D

1 Company Name and Address

F C I ALLENWOOD

P O BX 2500 FED CORRECTIONAL I

WHITE DEER PA 17887

UPS Account Number: 902-W96

Shipment Date: MM 03 DD 27 YY 98

UPS Shipping Record

UPS Shipping Record No. 001 7682425 84

1Z 902 W96 03 1003 336

Please Print Full Name and Address for Each Shipment Directly from Address Labels on Packages.

3 Service Level | 4 Package Information | 5 Additional Services | 6 When Using a Different Tracking Label, Stick Portion of That Label Below, Covering Printe

Receiver's Name and Address -or- If Same, Mark ➡ Same Address as Previous Page

MAC NY

City: BROOKLYN | State: NY | Postal/ZIP Code: 11232 | Country:

Residential Delivery

Service Level: Next Day Air / WW Express; 2nd Day Air / WW Expedited; 3 Day Select; Standard to Canada; **Ground**; Other

Package Information: Weight 48 | Letter ☐ | Oversize ☐ | Dimensional Weight ☐ | Declared Value .00 | C.O.D. Amount

Additional Services: **Delivery Confirmation**; **Delivery Confirm. Signature Required**; Saturday Delivery; Additional Handling; Hazardous Material; Call Tag; Other

Tracking Number: 1Z 902 W96 03 1003 336 2

7 ☐ Collect Billing ☐ 3rd Party — Collect / 3rd Party UPS Account No

8 Reference Number (Optional): GARNES

Other Information: 24646-053

Receiver's Name and Address -or- If Same, Mark ➡ Same Address as Previous Entry

☑ Residential Delivery

City | State | Postal/ZIP Code | Country

Service Level: Next Day Air / WW Express; 2nd Day Air / WW Expedited; 3 Day Select; **Standard to Canada**; **Ground**; Other

Package Information: Weight 46 | Letter ☐ | Oversize ☐ | Dimensional Weight ☐ | Declared Value .00 | C.O.D. Amount

Additional Services: **Delivery Confirmation**; **Delivery Confirm. Signature Required**; Saturday Delivery; Additional Handling; Hazardous Material; Call Tag; Other

Tracking Number: 1Z 902 W96 03 1003 337 1

☐ Collect Billing ☐ 3rd Party — Collect / 3rd Party UPS Account No

Reference Number (Optional):

Other Information:

Receiver's Name and Address -or- If Same, Mark ➡ Same Address as Previous Entry

☑ Residential Delivery

City | State | Postal/ZIP Code | Country

Service Level: Next Day Air / WW Express; 2nd Day Air / WW Expedited; 3 Day Select; **Standard to Canada**; **Ground**; Other

Package Information: Weight 16 | Letter ☑ | Oversize ☐ | Dimensional Weight ☐ | Declared Value .00 | C.O.D. Amount

Additional Services: **Delivery Confirmation**; **Delivery Confirm. Signature Required**; Saturday Delivery; Additional Handling; Hazardous Material; Call Tag; Other

Tracking Number: 1Z 902 W96 03 1003 338 0

☐ Collect Billing ☐ 3rd Party — Collect / 3rd Party UPS Account No

Reference Number (Optional):

Other Information:

Receiver's Name and Address -or- If Same, Mark ➡ Same Address as Previous Entry

[redacted]

☑ Residential Delivery

City: NY | State: NY | Postal/ZIP Code: 10032 | Country:

Service Level: Next Day Air / WW Express; 2nd Day Air / WW Expedited; 3 Day Select; **Standard to Canada**; **Ground**; Other

Package Information: Weight 17 | Letter ☐ | Oversize ☐ | Dimensional Weight ☐ | Declared Value .00 | C.O.D. Amount

Additional Services: **Delivery Confirmation**; **Delivery Confirm. Signature Required**; Saturday Delivery; Additional Handling; Hazardous Material; Call Tag; Other

Tracking Number: 1Z 902 W96 03 1003 339 9

☐ Collect Billing ☐ 3rd Party — Collect / 3rd Party UPS Account No

Reference Number (Optional): [redacted]

Other Information: [redacted]

Mark box ONLY if shipment to SAME ADDRESS is continued on page. ☐

Received for UPS by | Pickup Time | Total Packages | Total Call Tags | No. of

Part 2- Customer

Garnes v. Reno, et al.
Civil Action Number 1:CV-00-0700
Middle District of Pennsylvania

Declaration of Charles Fegley

Attachment E

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record

Institution: MDC BRO

1. Name:	2. Register Number:	3. Unit:	4. Date and Time of Inventory
GAINES, MARK	24646-053	4S	9/13/01 12

5. Purpose of Inventory (check one that applies): Date and Time of Action: 9/13/01 12 Noon
a. ✓ Admission b. ___ Hospital c. ___ Writ d. ___ Transfer e. ___ Detention f. ___ Release
g. ✓ Incoming package h. ___ Other (specify)

6. Disposition (Disp.)
D – Donated M – Mail S – Storage
K – Keep in Possession
C – Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
___	Batteries	___
___	Belt	___
___	Billfold	___
___	Books, reading hard___ , soft___	___
___	Books, religious hard___ , soft___	___
___	Brassiere	___
___	Cap, Hat	___
___	Coat	___
___	Coins	___
___	Comb	___
___	Combination lock	___
___	Dress	___
___	Driver's license	___
___	Earplugs	___
___	Eyeglass case	___
___	Eyeglasses	___
___	Gloves	___
___	Hair brush/pick	___
___	Handkerchief	___
___	Jacket	___
___	Jogging suit	___
18	Legal Materials	K
___	Letters	___
___	Magazines	___
___	Mirror	___
___	Nail Clippers	___
___	Pant/slacks	___
___	Pen, ballpoint	___
___	Pencils	___
___	Personal papers	___
___	Photo album	___
___	Photos	___

#	Article	Disp.
___	Plastic spoon, cup	___
___	Playing cards	___
___	Purse	___
___	Radio (w/earplug)	___
___	Religious medals	___
___	Ring	___
___	Shirt/blouse	___
___	Shoes	___
___	Shoes, shower	___
___	Shoes, slippers	___
___	Shoes, tennis	___
___	Shorts	___
___	Skirt	___
___	Slip	___
___	Social security card	___
___	Socks	___
___	Socks, athletic	___
___	Stamps	___
___	Stockings	___
___	Sunglasses	___
___	Sweater	___
___	Sweat pants	___
___	Sweat shirt	___
___	Trophy	___
___	T-Shirts	___
___	Underwear	___
___	Watch/watch band	___
___	Wig	___

b. Hygiene, etc.

#	Article	Disp.
___	Dental floss	___
___	Dentures	___
___	Deodorant	___
___	Hair oil	___
___	Noxzema	___
___	Powder	___
___	Razor	___
___	Razor blades	___
___	Shampoo	___
___	Shaving lotion	___
___	Skin lotion	___
___	Soap	___
___	Soap dish	___
___	Toothbrush	___
___	Toothpaste	___

c. Hobbycrafts

#	Article	Disp.

d. Food/Tobacco Items

#	Article	Disp.
___	Canned tobacco	___
___	Chewing tobacco	___
___	Cigarettes	___
___	Cigars, snuff	___
___	Coffeemate	___
___	Cold drink mix, soda	___
___	Fruit	___
___	Honey, Hi-protein	___
___	Instant chocolate	___
___	Instant coffee	___
___	Instant tea	___
___	Pipe cleaner/filters	___
___	Pipes	___

e. Miscellaneous (List any damaged property and from where it was received; e.g., U.S. Marshal)
Rest of Property Remailed back to institution (ALM).

UPS ENTRY 9 1Z 9XX 379 03 1008 861 1
UPS ENTRY 9 1Z 9XX 379 03 1008 862 0
Inmate here on writ.

8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate

No individual item over $100.00

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee):

R. 30

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accuracy. Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this inventory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Receiving Officer: [signature] Date: 9/13/01 Time: 12[illegible]

I have today reviewed the property returned to me. Signature of Inmate: [signature] Reg. No.: 24646-053 Date: 9/13/01 Time: 2[illegible]

b. Upon release of the inmate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's housing. The inmate certifies release of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the inmate claims a discrepancy in the inventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Releasing Officer: _____ Date: _____ Time: _____

I have today reviewed the property returned to me. Signature of Inmate _____ Reg. No.: _____ Date: _____ Time: _____

Original – Inmate's Central File; CC: Inmate, B & D, Special Housing

Garnes v. Reno, et al.
Civil Action Number 1:CV-00-0700
Middle District of Pennsylvania

Declaration of Charles Fegley

Attachment F

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST — AUTHORIZATION TO MAIL INMATE PACKAGE

8

Name of Inmate	Register No.	Institution
GARNES MARK	24646-053	MDC Brooklyn

Item(s)	Value
Legal Materials	$ 100.00

REQUEST

I am requesting that the above items be sent from the Institution to the address specified. The item(s) are my personal property. Total value is as shown above. I understand that if I insure the property, the USPS will only indemnify the ACTUAL value of the property up to the amount of insurance purchased. I will provide sufficient postage stamps to cover the cost of mailing and all services requested. I have completed the mailing label. below.

Insure? YES (NO) Certify? YES (NO) Register? YES (NO) Return Receipt? YES (NO)

Inmate Signature: [signature] Date: 3.4.99

APPROVAL

The above inmate is authorized to ship the item(s) shown.

Signature of Authorized Staff: [signature] Date: 3/4/99

MAR 10 1999

Property indicated above was packed and sealed in the inmates presence.

Signature of Authorized Staff: [signature] Date: 3/9/99

PROCESSING

Property indicated above was received and mailed on the date indicated. The following services were provided as requested above: (circle as appropriate)

INSURED CERTIFIED REGISTERED-Number assigned N/A

RETURN RECEIPT REQUESTED - YES NO Total Stamps Provided = $ 8.91

Mail Officer signature: [signature] Date 3/10/99

After mailing send copies of this form to : Original Mail Room, Copy – Inmate, R&D, Central File

USP LVN BP-329(18) February 198

FROM: Mark Garnes 24646053
Name

100 29th Street
Box or Street Address

Brooklyn NY 11232
City, State and ZIP Code

Postage Stamps Here

R. 32

TO: Mr. Tyrone L. Williams

P O Box 598

Bronx NY 10457-0598

Garnes v. Reno, et al.
Civil Action Number 1:CV-00-0700
Middle District of Pennsylvania

Declaration of Charles Fegley

Attachment G

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST — AUTHORIZATION TO MAIL INMATE PACKAGE

Name of Inmate	Register No.	Institution
GARNES, MARK	24646-053	MDC-Brooklyn

Item(s)	Value
Books, Legal Material, Photos, Personal Papers, Mail	$ 50.00

REQUEST

I am requesting that the above items be sent from the Institution to the address specified. The item(s) are my personal property. Total value is as shown above. I understand that if I insure the property, the USPS will only indemnify the ACTUAL value of the property up to the amount of insurance purchased. I will provide sufficient postage stamps to cover the cost of mailing and all services requested. I have completed the mailing label, below.

Insure? YES (NO) Certify? YES (NO) Register? YES (NO) Return Receipt? YES (NO)

Inmate Signature: Mark Garnes Date: 6-17-99

APPROVAL

The above inmate is authorized to ship the item(s) shown.

Signature of Authorized Staff: [signature] Date: 6-17-99

PROCESSING

Property indicated above was packed and sealed in the inmates presence.

Signature of Authorized Staff: [signature] Date: 6-17-99

Property indicated above was received and mailed on the date indicated. The following services were provided as requested above: (circle as appropriate)

INSURED CERTIFIED REGISTERED-Number assigned _____

RETURN RECEIPT REQUESTED - YES NO Total Stamps Provided = $ _____

Mail Officer signature: Date

After mailing send copies of this form to : Original Mail Room, Copy - Inmate, R&D, Central File

USP LVN BP-S29(58) February 19

FROM: Mark Garnes
Name

100 29th Street (24646-053)
Box or Street Address

Brooklyn, N.Y. 11232
City, State and ZIP Code

Postage Stamps Here

R. 34

TO: Mr. Tyrone L. Williams

P.O. Box 398

Bronx, NY 10467-0398

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 99-1524

UNITED STATES OF AMERICA,

Appellee,

v.

Mark Garnes,

Defendant-Appellant.

Brief of Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Mark A. Garnes
Pro Se Litigant
Reg. No. 24646-053
P.O. Box 2000-3B
FCI-Allenwood Med.
White Deer, Pa.
17887

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JURISDICTION STATEMENT

This is an appeal pursuant to Federal Rules of Appellate Procedures, Rule 4(b) and 18 U.S.C. § 3742 (a)(1), from a final judgment of conviction imposed upon resentence after the original sentence of 352 months has been vacated in the Eastern District of New York. In which, the original sentence was 120 months for count one, conspiracy to distribute heroin, 21 U.S.C. § 846; 292 months for count three, possession with the intent to distribute in excess of fifty grams of cocaine base, 21 U.S.C. § 841(a); and 60 months for use and/or carrying a firearm during a drug trafficking crime, 18 U.S.C. § 924(c)(1), to run consecutive to counts one and three, whereas, counts oneand three are concurrent.

Upon resentencing, the Honorable United States District Judge, Hon. Edward R. Korman, departed five years from the new sentence of 360 months due to the two point enhancement per U.S.S.G. § 2D1.1.(b)(1), eight months per 18 U.S.C. §924(c)(1) and fifty-two months for postconviction rehabilitation.

Appellant is currently serving his sentence of 300 months.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America, Appellee,	:	
v.	:	No. 99-1524
Mark Garnes, Appellant.	:	

STATEMENT OF THE CASE

On August 11th, 1988, the appellant was arrested for violation of narcotic offenses (21 U.S.C. § 846, Conspiracy to distribute Heroin, Count 1; 21 U.S.C. § 841(1), Possession with the intent to distribute in excess of 50 grams of Cocaine Base, Count 3) and a firearm offense 18 U.S.C. § 924(c)(1). The appellant thereafter was convicted of all offenses therein the indictment on November 2nd, 1989, by jury trial. Appellant was sentenced to 120 months for count one; 292 months for count three; sentences concurrent; and 60 months consecutive for count four, the firearm offense. Appellant's direct appeal was denied on June 16th, 1991.

Subsequently, appellant filed a 28 U.S.C. § 2255 ("2255") on August 30th, 1996. The district court on March 18th, 1998, by Order, vacated counts one and three for resentencing only. Count four was vacated based upon **Bailey v. United States, --- U.S. ---, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995).** On July 30th, 1999, resentencing was imposed, in which the appellant was enhanced two (2) points on count one per U.S.S.G. § 2D1.1(b)(1).

Appellant filed the Notice of Appeal, pro se, on August 13th, 1999. In which, appellant here now appeals the district court's Order and Judgment of Conviction.

ISSUES PRESENTED

1. WHETHER THE DISTRICT COURT ERRED BY NOT DISMISSING REMAINING COUNTS DUE TO PREJUDICIAL SPILLOVER

2. WHETHER THE DISTRICT COURT ERRED BY NOT HEARING APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

3. WHETHER THE DISTRICT COURT ERRED BY IMPOSING ONE POINT ENHANCEMENT

STATEMENT OF FACTS

(1) Appellant here contends that upon the district court vacating count four, the remaining counts, counts one and three were subject to "Prejudicial Spillover." The evidence pertaining to the vacated count. However, the district court's instructions to the jury noted should the defendant be found guilty of count four, then the defendant should also be found guilty of counts one and three. Vice versa. T.T. 544-545 The trial evidence was persausive for conviction on all counts. Evidence in relation to the vacated offense was only from the testimony of co-defendant/government witness Ms. Viola Nichols and the consensual search of appellant's residence. T.T.97,421 There was no evidence congruent, indicating that appellant 'used and/or carried' a firearm daily during any drug trafficking activity.

Furthermore, the indictment precisely states that appellant

was in possession of a firearm on August 11th, 1988, not prior to as the government witness testimony implies without any corroborating evidence. Upon arrest, appellant was not in personal possession of a firearm. **T.T. 342**

The jury convicted based upon the evidence. Appellant here maintains that the jury was without an option to demarcate the evidence for deliberation, attributing facts to individual offenses due to the district court's instructions.

(2) Here now, count four has been vacated, resulting in the spillover to the remaining counts, in which, appellant has been prejudiced.

Appellant next contends that the district court failed to grant an evidentiary hearing to appellant's claims of ineffective assistance of counsel, the record is clear and obvious to counsel's deficient performances.

Trial counsel conceded to the government's proposal to stipulate the testimony of an expert chemist, who was to determine the substances of counts one and three. **T.T.439-443**

Trial counsel failed to dispute the facts therein the PSR, that "1326 vials contained an **unknown substance** and 40 splastic bags contained an **unknown substance.** To which, the stipulations counsel conceded were disputable for sentencing purposes. Counsel's stipulations precluded appellant the right to confront and cross-examine the chemist to the elements of the substances of counts one and three. Counsel also failed to address these issues in his letter of objections to the district court. **PSR 4(12); Letter of Objection**

Furthermore, trial counsel failed to contest the quantity of heroin therein count one. The evidence during the trial, specifically the wiretaps, delineated the quantity distributed from February 1988 til August 1988. Counsel failed to dispute the 2.2 kilograms therein the PSR, when a fact finding hearing could have determined the quantity from the evidence produced, government witness, Ms. Viola Nichols and the wiretaps.

The final issue appellant contends is that the one point enhancement imposed per Criminal History Category was improper. In which, the payment of a twenty-five dollar fine does not constitute a "term of imprisonment" as prescribed by Congress and the United States Sentencing Commission.

Appellant was arrested for "Unlawful Possession of Marijuana", a twenty-five dollar fine was an option to three days in jail. Appellant contends that in accord to the statutes, each option is considered an infraction. Whereas, it is clear that Congress and the Commission agree that such is an infraction.

ARGUMENT

POINT I

THE PREJUDICIAL SPILLOVER FROM THE VACATED COUNT WARRANTS DISMISSAL OR A NEW TRIAL ON THE REMAINING COUNTS

Appellant contends that as a result of count four (18 U.S. C. § 924(c)(1)) being vacated, the remaining counts, one and three should be dismissed or a new trial granted due to the "Prejudicial Spillover" of the remaining counts.

The district court on July 30th, 1999, vacated the firearm count based upon Bailey v. United States, 116 S.Ct. 501 (1995).

The evidence pertaining to the firearm count was of such to incite the jury's decision coupled with the district court's instructions on the remaining counts.

The probativeness of testimony given by Ms. Nichols was imprecise to the firearm being carried. Ms. Nichols was unable to determine nor was an attempt made to detemine the type(s) of firearm appellant carried, with respect to the government's exhibits. **T.T.111-113** Counsel's Rule 29 Motion to the firearm count was dismissed, the district court suggestively inferred that the remaining counts should be dismissed before denying___ motion. **T.T. 443-444**

The government's exhibits, 56A - 90A (wiretaps) delineate the conspiracy activities, with no mention to a firearm. Also, Ms. Nichols states she does not know much about guns. **T.T.111-113** Considerably, a firearm exposed to a witness should be recognizable on account for identification in the future.

In **United States v. Jones, 16 F. 3d 487, 493 (2d Cir. 1994)**, "Retroactive Misjoinder" arises where a joinder of multiple counts was proper initially, but later developments - such as a district court's dismissal of some counts for lack of evidence or an appellate count's reversal of less than all convictions - render the initial joinder improper.

Jones further notes that appellant must show 'compelling prejudice', to invoke "Retroactive Misjoinder." **Id. at 493**

For "Retroactive Misjoinder" to withstand, herein the instant case, appellant must show 'compelling prejudice.' **United Staets v. Novod, 927 F.2d 726, 728 (2d Cir. 1991)** Prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice. **Id.**

at 728, quoting United States v. Vebuliunas, 76 F. 3d 1283, 1294 (2d Cir. 1996).

The Second Circuit in Vebuliunas, established a three part test in considering whether a defendant ascetains "Prejudicial Spillover." Id. at 1294 The three factors prescribed are: We first examine the evidence introduced in support of the vacated count to see if it 'was of such an 'inflammatory' nature that it 'would have tended to incite or arouse the jury into convicting the defendant on the remaining counts. Second, we must compare the evidence and facts pertaining to the dismissed count with that pertaining to the remaining counts and examine the degree of overlap and similarity between the two. Finally, we must make a general assessment of the strength of the government's case on the remaining counts. Id. at 1294

Indeed, a firearm has the potential for violence, presented to a jury, possible persuasion to convict. Coupled with the instructions to the jury, herein the instant case. The government's witness, Ms. Nichols testimony was persuasive for the jury to convict. However, the absence of this evidence, the firearm count, minus Ms. Nichols testimony to the vacated count held in abeyance, the jury's verdict is uncertain. Jones at 493 With consideration to count three (cocaine base) being stipulated (to be discussed in next issue) and the elements not proven. The outcome may differ from what the record reflects.

The evidence was significantly overwhelming to count one. Counts three (cocaine base) and the vacated firearm count were not heavily embossed. Given the jury instructions disallowed demarcation of the counts, the evidence was seemingly cemented

'subject in connection' for conviction. T.T. 48,544-545

Appellant here meets the relevant three factor test that warrants "Prejudicial Spillover" resulting from the vacated count. In which, dismissal or a new trial on the remainng counts may be rendered.

POINT II

THE TRIAL COURT ERRED BY FAILING TO DETERMINE COUNSEL'S DEFICIENT PERFORMANCES

(A) Counsel was ineffective for Stipulating to insufficient Evidence;

Appellant contends that counsel's performances were deficient, in that, counsel's deficiencies prejudiced appellant's trial and sentencing proceedings.

The record clearly reflects in pertinent part that counsel stipulated to disputable evidence, in which, the chemist could have determined the elements pertaining to counts one and three.

The substance of count one was heroin, the substance of count three was cocaine base. The PSR noted that "1326 vials and 40 splastic bags contained **unknown substances.** These evidentiary stipulations precluded the introduction of evidence significant for the jury's findings on the elements of the offense. Counsel's stipulations deprived appellant of his constitutional right to confront and cross-examine the chemist. A valid stipulation relieves the prosecution of producing other evidence, it does not relieve the prosecution of the burden of proving every element of the crime beyond a reasonable doubt. United States v. Gaudin, ---U.S.___, 115 S.Ct. 2310, 2320, 132

L. Ed. 2d 444 (1995)

Appellant contends that he was not advised by trial counsel as to the format and procedures to be followed at his trial with regards to the stipulations. It is further maintained that appellant did not sign a waiver nor acknowledged on the record, that he waived his Sixth Amendment right to challenge the evidence counsel stipulated. Moreover, appellant contends that he did not have any understanding as to the implications of the stipulations.

Appellant argues it was incumbent upon the court to determine whether he 'knowingly and voluntarily' agreed to the stipulations before allowing them to go to the jury. Johnson v. Cowley, 40 F. 3d 341, 344 (10th Cir. 1994).

In Brookhart v. Janis, 394 U.S. 1, 86 S.Ct. 1245, 16 L. Ed. 2d 314 (1966), the Supreme Court held that where a defendant enters a not guilty plea and asserts his right to trial, trial counsel cannot agree to proceed in a manner that is tantamount to a guilty plea, unless the defendant makes a knowing and intelligent waiver of his right to trial. See also Bonilla-Romero v. United States, 933 F. 2d 86 (1st Cir. 1991) If a stipulation is to all elements necessary for conviction, significant compliance with Rule 11 is required.

The appellant here in the instant case made it clear to the court that he was pleading not guilty. Appellant declined the initial plea offer and all verbal plea offers thereafter.

Several circuits have exercised partial colluquies to demonstrate that the defendant 'knowingly and voluntarily' waived his right. The record reflecting the admissions orally

or written to the stipulations. United States v. Gilliam, 994 F. 2d 97, 102 (2d Cir. 1993), although Gilliam aims at the defendant's proposal for the government to concede to his stipulation, the record is clear of Gilliam knowingly and voluntarily agreeing to stipulate should the government concede. See also United States v. Mohel, 604 F. 2d 748 (2d Cir. 1979); United States v. Lyons, 898 F. 2d 210, 213-215 (1st Cir. 1990).

Here in the instant case, the record is silent to an inquiry to determine apellant conceding knowingly and voluntarily to counsel's stipulations.

Counsel may not stipulate to essentially all of the elements of an offense without consent of the client. Trial counsel may ordinarily stipulate to matters easily proved as a matter of trial tactics. United States v. Poole, 832 F. 2d 561 (11th Cir. 1987).

The court in United States v. Stephen, 609 F. 2d 230 (5th Cir. 1980), addressed whether trial counsel could waive a client's 6th Amendment confrontation rights by stipulating to the use of a transcript of a prior trial involving co-defendants without obtaining the consent of the client. The Court held that trial counsel may waive his client's 6th Amendment right to confrontation by entering into evidentiary stipulations so long as (1) the defendant does not object to the procedure, and (2) thedecision was part of a legitimate trial tactic or part of a prudent trial strategy. Id. at 232

The Second Circuit has recognized that counsel's trial strategy must be binding. United States Ex Rel. Cruz v. LaVallee, 448 F. 2d 671, 679 (2d Cir. 1971) In order for a

waiver to be effective, it must be an "intentional relinguishment or abandonment of a known right or privilege. Mitchell v. Hoke, 745 F.S. 874, 878 (E.D.N.Y. 1990) Appellant notes a most recent case in the Tenth Circuit, where counsel's stipulation was signed by the defendant and counsel. In which, counsel did not violate defendant's rights. Hawkins v. Hannigan, 185 F. 3d 1146, 1154 (10th Cir. 1999)

Counsel violated appellant's Sixth Amendment rights to effective assistance of counsel, in part, that in criminal prosecutions, the accused shall have the right to confront witnesses against him. . . . unless that right is waived. Brookhart v. Janis, 384 U.S. 1 The elements of the stipulations were not proven pertaining to count three. The preponderance of the evidence is a duty upon the court to ensure the government carries this burden by presenting reliable and specific evidence. United States v. Lawrence, 48 F. 3d 1559, 1566 (11th Cir. 1995).

Counsel's evidentiary stipulations resulted in appellant receiving a more harsh sentence. Considering counsel would have objected to the PSR, the sentence would be less.

District judges are forced to rely on the expert testimony of chemists who specialize in drug analysis in order to determine the identity of a substance. United States v. Jackson, 968 F. 2d 158, 162 (2d Cir. 1992) The standard applicable to sufficiency has been oft repeated, viewing the evidence in the light most favorable to the government, the defendant must demonstrate that no rational trier of fact could have found the essential elements of the crime charged beyond

a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 61 L. Ed. 2d 560 (1979) The stipulations did not prove the elements of the substance being cocaine base. With regard to the jury being obliged to hear the testimony of the chemist, it is plausible the testimony would contain the validity of appellant's argument, that the substance stipulated was not cocaine base pertaining to the 1326 vials and 40 splastic bags.

Counsel's legal skills were deficient, in that, counsel failed to address the court to the results of the stipulations being disputable.

Questions as to whether the mixture found was cocaine base and its specific weight were factual findings for the judge at sentencing. The jury need only have found that these three chunks seized contained some mixture of cocaine as defined in Schedule II. United Staes v. Barnes, 890 F. 2d 545 (1st Cir. 1989). The Third Circuit considered the testimony of Dr. John David Alvin of the properties and percentages that distinguishes cocaine and cocaine base. United States v. James, 78 F. 3d 851, 855 (3rd Cir. 1996) noted that an evidentiary hearing was required to determine cocaine base was crack as the Sentencing Guidelines defined cocaine base as crack. See United States Sentencing Guidelines' Amendment 487. Also, United States v. Palacio, 4 F. 3d 151 (2d Cir. 1993)

(B) Counsel was ineffective for Not contesting the quantity

Appellant further contends that counsel's performances were deficient. Counsel failed to contest the quantity of

heroin attributed to appellant. The PSR notes that 2.2 kilograms of heroin was distributed from Feburary 1988 til August 1988. The evidence of the amount distributed can be gleaned from the government's evidence, specifically the wiretap exhibits 56A - 90A, also, government witness, Ms. Viola Nichols' testimony corroborating the wiretaps.

In United States v. Shonubi 998 F. 2d 84, 88-89 (2d Cir. 1993), the Court held that case law uniformly requires specific evidence----e.g , drug records, admissions or live testimony---to calculate drug quantities for sentencing purposes. The Court exemplifies that a 'course of conduct', is when a defendant engages over time in an identifiable pattern of criminal conduct. Id. at 89 The wiretap evidence depicts appellant's routine pattern attributed to count one (21 U.S.C. § 846 - Conspiracy to distribute heroin).

Appellant maintains that appoximately six ounces of heroin was distributed to government witness Ms. Viola Nichols in the noted time period. Counsel failed to establish these grounds before the sentencing court.

Counsel's representation was deficient, and the deficient performances prejudiced appellant's case.

A claim of ineffective assistance of counsel [under § 2255] must be scrutinized under the two-part test of Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must prove both that his counsel's representation was deficient and that the deficient performance prejudiced the defendant's case. The

first part of the test is met when the defendant shows that counsel 'failed to exercise the customary skills and diligence that a reasonably competent attorney would [have] exhibit[ed] under similar circumstances.' The second part is met when the defendant shows that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. United States v. Apfel, 97 F. 3d 1074, 1076 (8th Cir. 1996)

Appellant argues that counsel had a duty to advocate on his behalf, moreover, he had a duty to consult with appellant and keep appellant informed of the developments in the course of the prosecution. Strickland 466 U.S. 668 Counsel's stipulations violated appellant's rights to confront, cross-examine the expert witness and impeded appellant's due process rights at sentencing. A criminal defendant has the right to the assistance of counsel at all critical stages of the proceedings against him, or whenever his substantial rights may be affected. Estelle v. Smith, 451 U.S. 454, 469-471, 101 S.Ct. 1866, 68 L. Ed. 2d 359 (1981) Counsel's failure to consult with appellant regarding these fundamental decisions were, as determined in Brown v. Rice, 693 F.S. 397 (W.D.N.C. 1988), in error.

It is well documented that a district court has an obligation to assure itself that the information upon which it relies in sentencing defendants is both reliable and accurate. United States v. Pugliese, 805 F. 2d 1117, 1124 (2d Cir. 1986) Counsel failed to address the issues noted, in which, the court sentencing appellant accordingly.

Whether appellant is entitled to relief on these grounds is contingent upon whether trial counsel effectively challenged the government's evidence regarding counts one and three, which resulted in appellant receiving a lenghtier sentence, currently being served.

POINT III

The One Point Enhancement Imposed on Appellant's Criminal History was Improper

Appellant contends that the district court improperly imposed a one point enhancement to appellant's Criminal History for payment of a twenty-five dollar fine for "Unlawful Possession of Marijuana", per U.S.S.G. § 4A1.1(c). Payment of a fine is not considered a 'term of imprisonment' prescribed by U.S.S.G. § 4A1.2(b). Although U.S.S.G. § 4A1.2(c)(1) and (2) describe sentences counted and excluded, without listing "Unlawful Possession of Marijuana" as an offense or a possible nexus to consider, nearest possibility would be 'Public Intoxication' upon exclusion. However, U.S.S.G. 4A1.2(c)(1) states (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days or (B) the prior offense was similar to an offense: NOTED

Appellant had the option of paying the fine or to be confined for three days. Appellant opt for the payment of the fine. Congress precisely noted that an infraction was not more than five days or less or if no imprisonment is authorized, as an infraction. Federal Criminal Codes and Rules, 18 U.S.C. § 3559(a). See also United States v. Pyatt,

725 F.S. 887 (E.D.N.Y. 1989). Because the violation at bar does not authorize imprisonment, it is classified as an infraction.

Moreover, an 'infraction' is defined in Application Note 1 of the Guidelines' Section 1B1.9 as **any** offense for which the maximum authorized term of imprisonment is not more than five days. United States v. Moore, 968 F. 2d 224, 225 (2d Cir. 1992).

The sole interest of the defendant in sentencing is the right not to be sentenced on the basis of inaccurate or unreliable information. United States v. Lopez, 898 F. 2d 1505, 1512 (11th Cir. 1990). The United States Supreme Court has made clear that there is a due process right to be sentenced on the basis of accurate information. United States v. Tucker, 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972). On a claim of ineffective assistance of counsel, an evidentiary hearing should be held if, on the record, more than one inference can be raised as for the reasons of counsel's actions. Porter v. Wainwright, 805 F. 2d 930, 935-936 (11th Cir. 1986).

The district court failed to hear the issues herein noted, an evidentiary hearing would clearly support Appellant's claims.

Appellant here states that he is a Pro Se Litigant and should be held to less stringent standards, in which, the appeal here should be construed more liberatlly. Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed. 2d 652 (1972).

CONCLUSION

For the reasons set forth above, these matters should be remanded and appellant granted dismissal of the remaining

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,
Appellee,

v.

Mark Garnes,
Appellant.

CERTIFICATE OF SERVICE
99-1524

I, Mark Garnes, pro se, hereby certify under the penalty of perjury that on the 31st, day of January, 2000, I served by United States Mail, certified, the original and ten (10) copies of Appellant's Brief and Joint Appendix to the Deputy Clerk of the Court of Appeals for the Second Circuit and one copy to the Assistant United States Attorney, the two being the following:

Mrs. S. Washington-Goeloe
Deputy Clerk
United States Court of Appeals
For the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Mr. Andrew J. Frisch
Assistant United States
Attorney
Eastern District of
New York
147 Pierrepont Street
Brooklyn, New York 11201

DATED: January 31st, 2000
White Deer, Pennsylvania

Mark A. Garnes - Pro Se
Reg. No. 24646-053
P.O. Box 2000-3B
FCI-Allenwood Med.
White Deer, Pa. 17887

Mark A. Garnes
Reg. No. 24646-053
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White Deer, Pa.
17887

April 14th, 2000

Mrs. S. Washington-Goeloe
Deputy Clerk
United States Court of Appeals
For the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

RE: United States v. Mark Garnes 99-1524

Dear Mrs. Washington-Goeloe:

I submit the enclosed Appellant Reply Brief for review by the Honorable Justices therein the Court of Appeals.

Respectfully, I respect to know who are the Honorable Justices hearing this matter?

Thanking you in advance for your time, attention, and assistance to the withheld.

Respectfully yours,
Mark A. Garnes

Mark A. Garnes
Reg. No. 24646-053
P.O. Box 2000-3B
FCI Allenwood Med.
White Deer, Pa.
17887

April 14th, 2000

Mrs. S. Washington-Goeloe
Deputy Clerk
United States Court of Appeals
For the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

RE: United States v. Mark Garnes 99-1524

Dear Mrs. Washington-Goeloe:

I, the above noted comes forth to notify the Honorable Court that I have been transferred to the following facility:

LSCI Fort Dix
P.O. Box 38
Fort Dix, New Jersey
08640

Thanking you in advance for your time, attention, and assistance to the withheld.

Respectfully yours,
Mark A. Garnes
Mark A. Garnes

99-1524

To be submitted

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

AMOS, C.O. #1535, LOUISE COLEMAN, CAROL CRAFT, MARTHA CRAFT, CHAR T. DAVIS, MAN SING ENG, HOWARD MASON, BRIAN GIBBS, CLAUDIA MASON, IDA NICHOLS, JOANNE McCLINTON NICHOLS, VIOLA NICHOLS, JOSEPH ROGERS, KAROLYN TYSON, WILSON SKINNER, MARCIA NICHOLS WILLIAMS, PARIS WILLIAMS,

Defendants,

MARK GARNES,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF AND APPENDIX FOR THE UNITED STATES

LORETTA E. LYNCH,
United States Attorney,
Eastern District of New York.

EMILY BERGER,
ANDREW FRISCH,
Assistant United States Attorneys,
Of Counsel.

To be argued by
ANDREW J. FRISCH

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 99-1524

UNITED STATES OF AMERICA,

Appellee,

- against -

AMOS, C.O. #1535, LOUISE COLEMAN, CAROL CRAFT, MARTHA CRAFT, CHAR T. DAVIS, MAN SING ENG, HOWARD MASON, BRIAN GIBBS, CLAUDIA MASON, IDA NICHOLS, JOANNE MCCLINTON NICHOLS, VIOLA NICHOLS, JOSEPH ROGERS, KAROLYN TYSON, WILSON SKINNER, MARCIA NICHOLS WILLIAMS, PARIS WILLIAMS,

Defendants,

MARK GARNES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES

LORETTA E. LYNCH,
United States Attorney,
Eastern District of New York.

EMILY BERGER,
ANDREW J. FRISCH,
Assistant United States Attorneys,
(Of Counsel).

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 99-1524

UNITED STATES OF AMERICA,

Appellee,

- against -

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Defendants,

MARK GARNES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Mark Garnes appeals from a July 30, 1999 amended judgment entered in the United States District Court for the Eastern District of New York (Korman, J.). After granting in part and denying in part Garnes's petition for a writ of habeas corpus under 28 U.S.C.

§ 2255, the district court resentenced Garnes on that date.

Garnes resentencing arose from his conviction after a jury trial of conspiracy to distribute heroin in violation of 21 U.S.C. § 846, possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1)(A)(iii), and using and carrying firearms during and in relation to drug trafficking crimes in violation of 18 U.S.C. § 924(c). On January 4, 1991, Garnes was sentenced to 292 months incarceration to be followed by a consecutive term of five years imprisonment on the firearms count, five years of supervised release, and a $150 special assessment. This Court affirmed the conviction in an unpublished order. United States v. Garnes, No. 91-1041 (2d Cir. June 14, 1991).

In his petition Garnes argued in part that Bailey v. United States, 516 U.S. 137 (1995), required vacatur of his firearms conviction. By order dated March 26, 1998, the district court vacated the firearms conviction based on Bailey and United States v. Vasquez, 85 F.3d 59 (2d Cir. 1996), and vacated the other counts of conviction for the purpose of resentencing only. On July 30, 1999, Garnes was resentenced to 300 months incarceration, which he is serving, a five-year period of supervised release, and a special assessment of $150.

On appeal, Garnes claims that the district court should have dismissed the drug counts when it dismissed the firearm count, because of spillover prejudice from evidence at trial concerning the firearms; he was denied effective assistance of counsel at trial and sentencing; and the district court erroneously calculated his

criminal history category.

As demonstrated below, these claims are meritless, and the amended judgment of the district court, which granted in part and denied in part Garnes's petition should be affirmed.

STATEMENT OF FACTS

A. Overview Of The Case And Procedural History

Garnes was convicted for his role in a Brooklyn-based street-level narcotics organization headed by Garnes's half-brother, Brian Gibbs. Garnes regularly delivered cut heroin to Viola Nichols, a cooperating defendant and one of Gibbs's workers, for packaging and thereafter Garnes transported packaged heroin, which he stored at his Brooklyn apartment, to retail drug spots operated by Gibbs's organization.

The evidence at trial included Nichols's testimony about Garnes's role in the operation, wiretaps of telephone conversations in which Garnes and others discussed their drug business, testimony from a detective who stopped Garnes at the Los Angeles International Airport ("LAX") and seized $32,000 in cash from him, and evidence seized during a search of Garnes's apartment. Evidence of Garnes's connection to firearms was established through firearms seized during the search, and Nichols's testimony that Garnes always carried a gun when he brought or retrieved drugs from her house.

On direct appeal, Garnes claimed, among other things, that he was denied effective assistance of counsel at trial because his lawyer elicited from an agent that Garnes's girlfriend said that the seized guns and drugs belonged to Garnes. On June 14, 1991, this Court affirmed Garnes's conviction. United States v. Garnes, No.

91-1041 (2d Cir. June 14, 1991) (GA 25-27).[1]

On August 30, 1996, Garnes filed a pro se petition pursuant to 28 U.S.C. § 2255, claiming inter alia that: the evidence that he used or carried a firearm was insufficient; his trial counsel was ineffective in stipulating to various facts including the testimony of a government chemist about her analysis of seized narcotics, in failing to contest drug quantity at sentencing, and in failing to contest the legality of court-ordered wiretaps; and the district court erroneously calculated his criminal history category.

The government argued that Garnes's claims were without merit, except that vacatur of the firearms count was required by Bailey, 516 U.S. 137, and Vasquez, 85 F.3d 59. Bailey held that evidence of active employment of a firearm is required to show use of a firearm under 18 U.S.C. § 924(c), which prohibits the use or carrying of a firearm in connection with a drug trafficking crime. Vasquez held that a pre-Bailey erroneous jury instruction on use of a firearm does not require reversal if the evidence showed that the defendant necessarily carried the firearm in question. Reversal would be required, however, if there was evidence at trial of multiple firearms at different locations, and it was not clear upon which firearm the jury predicated its verdict. The evidence at Garnes's trial included the firearms seized from Garnes's apartment

[1] Numbers in parenthesis preceded by "A" refer to Garnes's appendix, those preceded by "T" refer to the trial transcript and those preceded by "GA" refer to the government's appendix. In addition the presentence report and addenda are submitted to the Court separately, under seal.

and Nichols's testimony about Garnes's carrying firearms. Reversal of the firearms count was required because it was not clear on which firearm the jury predicated its verdict.

By order dated March 26, 1998, the district court vacated the firearms count. The district court vacated the other counts of conviction for the purpose of resentencing only and directed the Probation Department to prepare an updated presentence report reflecting a two-level enhancement for possession of a firearm under U.S.S.G. § 2D1.1(b)(1). Garnes's initial sentence had not included that enhancement because it instead included the mandatory consecutive five-year term of imprisonment imposed under Section 924(c). The Department determined that Garnes's applicable range with the enhancement under U.S.S.G. §2D1.1(b)(1) was 360 months to life. This was a longer period than the 352-month sentence (292 months for the drug counts and 60 months for the firearms conviction) that had been imposed initially. (See generally PSR Addendum).

On July 30, 1999, Garnes was resentenced with the assistance of newly-appointed counsel. Garnes sought a downward departure based on his extraordinary rehabilitation while incarcerated. The government opposed. But it indicated that it might be proper to make a slight downward departure so that Garnes could be sentenced to the same 352 months to which he was initially sentenced. The district court first downwardly departed to 352 months. The court granted Garnes a further downward departure and imposed a sentence of 300 months, finding that Garnes had "shown

some effort at rehabilitation." (A 46).

B. The Evidence At Trial

The evidence at trial is summarized to the extent it is relevant to Garnes's claim of spillover prejudice.[2] The government's case consisted of Nichols's testimony about Garnes's role in Gibbs's drug operation, corroborated by approximately 34 conversations intercepted from a court-authorized wiretap on her home telephone and searches of Garnes and his apartment. One witness testified on Garnes's behalf that she never saw him associated with drugs.

a. Nichols's Role In The Organization

Viola Nichols met Brian Gibbs in January 1988, after her release from New York State prison. Gibbs was by then a close associate of Lorenzo Nichols. When Viola Nichols met Gibbs, he was operating a retail drug operation in Brooklyn, along with Garnes and others, including Herman Brothers, a/k/a "Herms." Nichols asked Gibbs for a job in his operation and, after obtaining approval from Lorenzo Nichols, Gibbs gave Nichols a job packaging heroin. (T 87-88).

In late January 1988, Gibbs delivered a quantity of heroin to Nichols at her home, along with packaging paraphernalia, including baggies, rubber bands, and rubber stamps bearing Gibbs'

---

[2] A longer summary is contained in the government's brief on appeal, made part of the government appendix. (See GA 7-19).

"brand names," one of which was "Hit Man." (T 89-90). Thereafter, Nichols worked packaging heroin for Gibbs several times a week, until July 1988. During that period, Garnes generally delivered the heroin to Nichols and picked it up from her, although Herman Brothers sometimes made deliveries. In addition, Garnes generally paid Nichols for her work, at rates ranging from $600 to $300 per ounce of heroin. (T 89-94, 104, 108).

b. Nichols's Contacts With Garnes

Viola Nichols was in almost daily contact with Garnes between February and late July 1988. They spoke frequently by telephone, often several times a day, and he often visited her house, usually arriving in a Volvo or on a motorcycle, to deliver drugs or money. (T 100-03). On other occasions, Garnes visited Nichols's house to socialize with Linda Rodway, a Queens woman who sometimes helped Nichols bag heroin. (T 105-06).

During their numerous conversations, Garnes and Nichols discussed aspects of Gibbs's operation. Garnes told Nichols that the heroin was sold in Brooklyn and that he was responsible for supplying the "spots." Garnes told Nichols that, to simplify that task, he kept a supply of narcotics in his Brooklyn apartment, where he lived with a girlfriend, Carmen Ayala. (T 93-94, 96). When Nichols asked Garnes one day about a large quantity of crack that he was carrying, he explained that he and Gibbs also sold crack. (T 96-97). Whenever Garnes came to Nichols's home to deliver or pick up narcotics, he carried a gun; Nichols saw him with different

guns on different occasions. (T 97, 111-13).

In a number of wiretapped conversations Garnes, Nichols, Gibbs and others discussed their drug business, sometimes in a Pig-Latin type slang. (T 113-14). In many of those conversations, Garnes called Gibbs and others from Nichols's home; other times, Nichols and Garnes spoke by telephone. Those conversations corroborated Nichols's testimony concerning Garnes's role in Gibbs's organization. For example, on March 18, 1988, Nichols told Garnes in Pig-Latin that she needed a rubber stamp of the sort used to stamp "brand names" on packages of heroin. Garnes replied, "Es-yay, es-yay, ou-yay onna-gay it-gay on-way. [Yes, yes, you gonna get one.] OK?" (T 135).

Garnes also frequently discussed Nichols's "job" over her telephone. Those conversations demonstrated Garnes's familiarity and participation in the drug trafficking. (See, e.g., T 153, 158-59, 175).

Nichols stopped working for Gibbs and Garnes in July 1988, after they accused her of tampering with some of their heroin. Nichols discussed the situation with Garnes in several recorded conversations which again demonstrated Garnes's familiarity and participation in the drug trafficking. (See, e.g., T 197-98).

c. The Los Angeles Airport Stop

Los Angeles County Deputy Sheriff Robert Mallon was assigned to a drug and currency task force at LAX. He stopped Garnes and two companions there on June 9, 1988. After Garnes

produced an identification card and airline ticket in different names, Deputy Mallon asked Garnes whether he was carrying any large sums of cash or drugs. When Garnes replied that he was not, Deputy Mallon asked for and received permission to search Garnes' shoulder bag. Inside the bag, Deputy Mallon found $31,295, mostly in small bills. (T 321-23).[3]

d. The Jewelry Purchase

Manhattan jeweler Peter Marsten testified that, in the second week of June 1988, Garnes purchased custom-made jewelry from him for $4,825. After an initial down payment, Garnes told Marsten that "he had a problem that he said happened in L.A. that he wouldn't be able to pay me so quickly." (T 218).

e. The Search

Several intercepted telephone calls indicated that Garnes lived at an apartment at 2727 Surf Avenue, Brooklyn (the "Apartment"), with Carmen Ayala. For example, on June 10, 1988, Garnes, from Nichols' home, called Ayala at the Apartment. Garnes told Ayala that he had to take care of some things, "then I'm coming home." Moreover, the identification card Garnes produced at LAX listed Garnes' address as 2727 West 28th Street, Brooklyn, New York. (T 321). That is another address for the building at 2727 Surf

[3] Garnes told Viola Nichols about the currency seizure (T 110-11), and, in a wiretapped conversation on June 16, 1988, Nichols discussed the seizure with Gibbs, who said that "Country" had "fucked up a lot of motherfucking paper [money]" (T 177-78).

Avenue. (T 353).

On August 11, 1988, FBI Special Agent Charles Gianturco led a team of FBI agents and New York City Police Officers to the Apartment to execute a warrant for Garnes's arrest. After obtaining consent to search the Apartment from Carmen Ayala, agents seized five fully or partially loaded firearms and ammunition from a bedroom closet, and a loaded handgun, ammunition, heroin and 1,326 vials of crack from a kitchen cabinet.

f. The Defense Case

Garnes called one witness, Linda Rodway. Rodway, who had been riding a motorcycle with Garnes at the time of his arrest on August 11, 1988 (T 337-39), testified that she met Garnes at Viola Nichols's house in March 1988, and she and Garnes began dating (T 447). Rodway said that she frequently went to Nichols's home and smoked cocaine, while Nichols smoked crack; Rodway also helped Nichols bag heroin. (T 452). While at Nichols's home, Rodway frequently saw numerous people whom she knew to be drug dealers, including Gibbs. (T 457-58). Although Garnes also was a frequent visitor to Nichols's home, sometimes in the company of Gibbs, Rodway never saw Garnes with drugs. (T 448, 458).

ARGUMENT

POINT ONE

GARNES'S CLAIM THAT THE COURT SHOULD HAVE DISMISSED THE DRUG COUNTS BASED ON PREJUDICIAL SPILLOVER WAS WAIVED IN THE DISTRICT COURT AND IS WITHOUT MERIT

Garnes claims on appeal that the district court should have vacated the two drug counts for which he was convicted, when it vacated Garnes's conviction under 18 U.S.C. § 924(c), because of prejudicial spillover from evidence concerning the firearms. Garnes's claim is procedurally barred and is without merit.

Garnes did not claim in his petition in the district court that the two drug counts should be vacated because of prejudicial spillover. There appears to be no evidence in the record that the government, Judge Korman or Garnes's appointed lawyer at resentencing ever addressed themselves to the issue. By failing to raise the point earlier, Garnes waived the argument for direct appeal. E.g. Douglas v. United States, 13 F.3d 43, 46 (2d Cir. 1993).

The claim is also without merit. In United States v. Rooney, 37 F.3d 847, 855 (2d Cir. 1994), this Court set forth the standard for determining whether prejudicial spillover from a dismissed count requires remaining convictions to be upset:

> First, we examine whether the evidence on the reversed count would have tended to incite or arouse the jury into convicting the defendant on the remaining counts. . . .
>
> Second, it is appropriate to look to the

> similarities and differences between the evidence on the reversed count and the remaining counts. Courts have concluded that where the reversed and the remaining counts arise out of similar facts, and the evidence introduced would have been admissible as to both, the defendant has suffered no prejudice.

United States v. Rooney, 37 F.3d at 855 (citations omitted). It is also "routine when examining potential prejudice" to look at the "strength of the government's case." Id. at 856.

Garnes does not meet the Rooney test for at least two separate reasons. First, the firearms were admissible evidence on the drug charges. This Court has "repeatedly approved the admission of firearms as evidence of narcotics conspiracies, because drug dealers commonly keep firearms on their premises as tools of the trade." United States v. Becerra, 97 F.3d 669, 671 (2d Cir. 1996) (quoting United States v. Vegas, 27 F.3d 773, 778 (2d Cir.), cert. denied, 513 U.S. 911 (1994)), cert. denied, 519 U.S. 437 (1997); Rosario v. United States, 164 F.3d 729, 735 (2d Cir. 1998), cert. denied, 526 U.S. 1033 (1999). Garnes's firearms were especially compelling evidence on the drug counts because they helped prove Garnes's role in the operation: a drug dealer like Garnes, whose role was to transport narcotics to and from locations in New York City, would reasonably be expected to keep and carry guns for protection. Thus, the evidence of the guns was admissible even without a gun charge.

Second, the evidence against Garnes on the drug counts was overwhelming. Nichols testified in detail about Garnes's role in the drug conspiracy, the jury heard intercepted telephone

conversations in which Garnes unmistakably discussed his role in the drug conspiracy, heroin and 1,326 vials of crack were seized from his apartment, and $32,000 in cash was seized from him at LAX. Given the strength of the case against Garnes, it is inconceivable that the jury would have returned a different verdict but for admission of the firearms.

POINT TWO

GARNES'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS PROCEDURALLY BARRED AND WITHOUT MERIT

Garnes claims that his counsel was ineffective in stipulating to testimony by the expert chemist and not contesting drug quantity at sentencing. Much of Garnes's claim is barred and all of it is without merit.

This Court requires a defendant to raise an ineffective assistance claim on direct appeal when he is represented by new counsel on appeal, and the claim can be decided on the then-extant record. If the defendant does not timely raise the claim, he waives it. Billy-Eko v. United States, 8 F.3d 111, 114-16 (2d Cir. 1993).

Here, Garnes was represented by new counsel by the time of sentencing and raised ineffective assistance of trial counsel on direct appeal. Notably, however, Garnes argued in support of that claim only that his lawyer erred by eliciting from Carmen Ayala that the seized guns and drugs belonged to Garnes. Garnes did not explain in his petition in the district court or on this appeal why he failed to argue that his trial lawyer was ineffective by stipulating to testimony by the chemist, even though Garnes was represented by new counsel. Under Billy-Eko, Garnes cannot raise the claim now.

Moreover, that claim and Garnes's other claim of ineffective assistance are without merit. Garnes complains about counsel's decision to stipulate to the chemist's testimony (see GA 4-6) without explaining why it was a mistake for counsel to

stipulate or how Garnes was prejudiced by the stipulation. Thus, he has not shown that "his attorney's conduct fell below an objective standard of reasonableness, and that but for his attorney's unprofessional errors, the result of the proceeding would have been different." United States v. Reiter, 897 F.2d 639, 645 (2d Cir.), cert. denied, 498 U.S. 817 (1990) (citation omitted); Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

Moreover, this Court recently held that "defense counsel may waive a defendant's Sixth Amendment right to confrontation where the decision is 'one of trial tactics or strategy that might be considered sound.'" United States v. Plitman, 194 F.3d 59, 64 (2d Cir. 1999). The Plitman Court held that defense counsel made a valid decision to stipulate to the admission of hearsay testimony damaging to the defendant, because the stipulation potentially limited the amount of prejudicial testimony. Id. Here, the stipulation simply reported the results of scientific tests, which tests Garnes does not claim he challenges. Moreover, the stipulation avoided having a witness highlight the drugs during testimony.

Equally unavailing is Garnes's claim that counsel was ineffective in failing to contest the amount of drugs at sentencing. Garnes's argument focuses upon the fact that certain substances were initially classified as "unknown." (See Br. at 7). Notably these substances were of unknown chemical composition only for a short time, when found in Garnes's apartment. They became known as heroin and crack, as soon as chemically tested. Thus, it is no surprise

that the attorney who represented Garnes at his initial sentencing and on appeal did not challenge the drug quantity for which Garnes was found accountable under U.S.S.G. § 2D1.1. Notably, even now, Garnes does not explain why he waited five years to argue that counsel erred by not challenging drug quantity or how he was prejudiced by any such error.

POINT THREE

GARNES'S CHALLENGE TO HIS CRIMINAL HISTORY CATEGORY IS PROCEDURALLY BARRED AND WITHOUT MERIT

Garnes claims that his criminal history score under U.S.S.G. § 4A1.1 should not have included one point for a 1986 arrest for possession of marijuana. Notably Garnes did not raise this claim on direct appeal, does not allege any change in the law since his appeal and, indeed, did not raise the claim in connection with his resentencing.[4] Thus Garnes has waived the claim. See Treistman v. United States, 124 F.3d 361, 369 n.8 (2d Cir. 1997).

Moreover, the claim is without merit. Garnes received a point because he was sentenced in 1986 to pay a $25 fine for unlawfully possessing marijuana. That fine qualified as a prior sentence under U.S.S.G. § 4A1.2(a)(1) and 4A1.1(c). In addition, while unlawfully possessing marijuana is neither a felony nor a misdemeanor under New York State law, it is not among the petty offenses excluded from calculation of criminal history category under the Guidelines, U.S.S.G. § 4A1.2(c). Thus, Garnes was properly assessed the point.

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[4] The criminal history point was not discussed at Garnes's 1991 sentencing. However, defense counsel referred at sentencing to a letter he had submitted "concerning the criminal history category." (A 31). The government has not been able to locate that letter to determine whether Garnes's current claim was raised.

CONCLUSION

For the foregoing reasons, the amended judgment of the district court, which granted in part and denied in part Garnes's petition pursuant to 28 U.S.C. § 2255 should be affirmed.

Dated: Brooklyn, New York
April 3, 2000

Respectfully submitted,

LORETTA E. LYNCH,
United States Attorney,
Eastern District of New York.

EMILY BERGER,
ANDREW J. FRISCH;
Assistant United States Attorneys,
(Of Counsel).

A P P E N D I X

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : CR-88-00496(S-4)

Plaintiff, :

-against- :

United States Courthouse
Brooklyn, New York

MARK GARNES,
a/k/a "Country", :

November 2, 1989
Defendant. : 10:15 o'clock p.m.

- - - - - - - - - - - - - - - X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government: ANDREW J. MALONEY
United States Attorney
BY: LESLIE R. CALDWELL
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York

For the Defendant: EDWARD P. JENKS, ESQ.

Court Reporter: Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

GA 2

THE COURT: Obviously it is not irrelevant.

MS. CALDWELL: It is not cumulative.

THE COURT: It is not necessary.

MS. CALDWELL: What is Your Honor's ruling?

THE COURT: I am not allowing any of it. Let's go.

(In open court.)

MS. CALDWELL: Your Honor, in light of your ruling, we have just some stipulations to read into the record.

THE COURT: Go ahead.

MS. CALDWELL: The first one is marked as Government Exhibit 92. Government Exhibit 92 reads as follows:

It is hereby stipulated and agreed by and among the undersigned counsel for all parties that if Any Siegel were called to testify at the trial of this case, she would testify as follows:

She is employed as sales coordinator of the MobileComm Company, a company which leases beepers and other paging devices. As sales coordinator, Ms. Siegel is a custodian of records of the MobileComm Company.

She's examined the records of the MobileComm Company relating to subscriber information for beeper number (212) 277-5689. Those records include Government Exhibit 91 and are kept in the course of the MobileComm Company's regularly conducted business and it is the regular practice of the MobileComm Company to keep those records.

GA 3

Those business records marked as Government Exhibit 91 reflect the following.

Between June 3, 1988 and October 18, 1988, the beeper corresponding to telephone number (212) 277-5689 was leased to Tony Garnes, 2727 West 28th Street, Brooklyn, New York.

The government offers Exhibits 91 and 92 in evidence.

MR. JENKS: No objection.

THE COURT: 91 and 92 are in evidence.

(So marked.)

MS. CALDWELL: The next stipulation reads as follows:

It is hereby stipulated and agreed by and among the undersigned counsel for all parties that if Maryann Garner were called to testify at the trial of above case she would testify as follows:

She is employed in the Security Department of the New York Telephone Company and is a custodian of records of the New York Telephone Company.

She has examined records of the New York Telephone Company relating to subscriber information for telephone numbers (718) 265-2008, (718) 265-3026, (718) 827-8244 and (718) 322-5127.

Those records are kept in the course of the New York Telephone Company's regularly conducted business and it is the regular practice of the New York Telephone Company to keep those records.

GA 4

Those business records reflect the following.

During the period of February through June, 1988, telephone number (718) 265-2008, was subscribed to Carmen Ayala, 2727 Surf Avenue, apartment 528, Brooklyn, New York.

During the period June through August, 1988, telephone number (718) 265-3026 was subscribed to Carmen Ayala, 2727 Surf Avenue, apartment 528, Brooklyn, New York.

During the period February through August, 1988, telephone number (718) 827-8244 was subscribed to G. Barfield and billed to D. Gibbs, both at 1266 Sutter Avenue, apartment 4-B, Brooklyn, New York.

During the period February through August, 1988, telephone number (718) 322-5127 was subscribed to Miriam Rodway, 111-32 146th Street, Jamaica, Queens, New York.

Your Honor, I offer Government Exhibit 93 at this time.

MR. JENKS: No objection.

THE COURT: 93 in evidence.

(So marked.)

MS. CALDWELL: The next stipulation relates to the narcotics and reads as follows:

It is hereby stipulated and agreed by and among the undersigned counsel for all parties that if Mohini Motwani were called to testify at the trial of the above case she would testify as follows.

GA 5

She's a chemist with the New York City Police Department laboratory.

On or about August 25, 1988, she performed laboratory analyses of the contents of Government Exhibits 1, 2, 3, 4, 5 and 6. Based on her analyses, Ms. Motwani reached the following conclusions.

Government Exhibit 1 consists of eight hundred vials, each of which contains cocaine base, also known as crack.

The net weight of Government Exhibit 1 is two and a half ounces, plus 16 grains.

Government Exhibit 2 consists of 526 vials, each of which contains cocaine base, also known as crack. The net weight of Government Exhibit 2 is 1 and 5/8 ounces plus 18 grains.

Government Exhibit 3 consists of one bag, which contains cocaine base, also known as crack. Net weight of Government Exhibit 3 is one ounce plus 51 grains.

Government Exhibit 4 consists of 31 vials, each of which contains cocaine base, also known as crack. The net weight of Government Exhibit 4 is 52 grains.

Government Exhibit 5 consists of 201 vials, each of which contains cocaine base, also known as crack. The net weight of Government Exhibit 5 is 5/8 of an ounce plus 20 grains.

Government Exhibit 6 consists of two hundred

GA 8

envelopes, each of which contains heroin. The net weight of Government Exhibit 6 is 1/8 ounce plus 5 grains.

And finally, Government Exhibit 13 consists of 120 envelopes packed in rice. The 120 envelopes contain heroin. Net weight is the -- excuse me, is the weight of the substance analyzed exclusive of the packaging.

The government rests.

I will offer, I'm sorry, I will offer 94 into evidence.

MR. JENKS: No objection.

THE COURT: 94 in evidence.

(So marked.)

MR. JENKS: May we approach, Your Honor?

THE COURT: Yes.

(Side bar follows.)

MR. JENKS: Your Honor, it might be a good point at this time to take a quick two minute recess. I am going to call one short witness and that should be it.

Also, with respect to the last count against Garnes in the indictment, I'd ask for a Rule 29 judgment of acquittal on using the gun during and in relation to a narcotic trafficking crime.

The only testimony we've had about a gun anywhere has been from Viola Nichols.

THE COURT: What does that mean? I don't understand.

91-1041

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

LORENZO NICHOLS, HOWARD MASON, LOUISE COLEMAN, AMOS COLEMAN, VIOLA NICHOLS, JOANNE MCCLENDON NICHOLS, IDA NICHOLS, MARICA NICHOLS WILLIAMS, MARTHA CRAFT, CAROL CRAFT, CLAUDIA MASON, WILSON SHEPHERD, KAROLYN JASON, MARY GARNES, PARIS WILLIAMS, MANSINGER, DEAN GIBBS, JOSEPH ROGERS, CHARLES DAVIS,

Defendants,

—and—

MARY GARNES,

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of New York

BRIEF FOR THE UNITED STATES

ANDREW J. MALONEY
United States Attorney
Eastern District of New York

[illegible]

[illegible]
Assistant United States Attorneys

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 91-1041

UNITED STATES OF AMERICA,

Appellee,

—against—

LORENZO NICHOLS, HOWARD MASON, LOUISE COLEMAN, AMOS COLEMAN, VIOLA NICHOLS, JOANNE MCCLINTON NICHOLS, IDA NICHOLS, MARICA NICHOLS WILLIAMS, MARTHA CRAFT, CAROL CRAFT, CLAUDIA MASON, WILSON SKINNER, KAROLYN TYSON, MARK GARNES, PARIS WILLIAMS, MAN SING ENG, BRIAN GIBBS, JOSEPH ROGERS, CHAR T. DAVIS,

Defendants,

MARK GARNES,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

Mark Garnes, a/k/a "Country," appeals from a judgment entered in the United States District Court for the Eastern District of New York (Korman, J.), following his conviction at a jury trial. Garnes was convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. § 846, possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1)(A)(iii), and using and carrying firearms during and in relation to drug trafficking crimes, in violation of 18 U.S.C. § 924(c). He was sentenced on January 4, 1991 to a total of 292 months imprisonment on the narcotics counts, to be followed by a consecutive term of five years imprisonment on the firearms count and a five-year period of supervised release. The district court also imposed the mandatory $150 special assessment. Garnes is serving his sentence.

Garnes appeals his conviction on two grounds. First, he argues that the district court improperly denied his pretrial motion to suppress evidence seized during a consent search of his Brooklyn, New York apartment. Specifically, Garnes claims that the circumstances under which consent was obtained—immediately following a security sweep of the apartment by armed agents who did not indicate that consent could be refused—rendered it involuntary. Second, Garnes claims that he received ineffective assistance of counsel at trial, because his trial counsel elicited damaging testimony on cross-examination of a government witness. Although the testimony was stricken and the court twice told the jury to disregard it, Garnes claims that the jury nevertheless must have considered the testimony in voting to convict.

For the reasons that follow, Garnes' arguments should be rejected.

STATEMENT OF FACTS

A. Introduction

Garnes' trial centered on his role in a Brooklyn-based street-level narcotics organization headed by Garnes' half-brother, Brian Gibbs, a/k/a "Glaze." The evidence at trial established that, between February and August 1988, Gibbs' organization regularly obtained multi-ounce quantities of heroin from Queens drug dealer Lorenzo "Fat Cat" Nichols. After buying the heroin, members of Gibbs' gang arranged to have the drug cut, packaged, and sold at retail sale points in Brooklyn. The gang also dealt in crack, which it obtained from sources other than Nichols' organization.

Garnes' conviction arose from his involvement in Gibbs' operation. Specifically, through wiretap evidence, the testimony of a co-conspirator, and evidence seized during searches of Garnes and his apartment, the government established that Garnes regularly delivered cut heroin to one of Gibbs' workers, Lorenzo Nichols' sister and government witness Viola Nichols, for packaging. Garnes also picked up packaged heroin from Viola Nichols, paid her, and delivered packaged heroin, which he stored at his Brooklyn apartment, to retail drug spots operated by Gibbs' organization. While engaged in those activities, Garnes regularly carried firearms.

B. The Suppression Hearing and the District Court's Ruling

Prior to trial, Garnes moved to suppress: (i) evidence seized during a search of his apartment at 2727 Surf Avenue, Brooklyn, New York, pursuant to the consent of his girlfriend, Carmen Ayala; (ii) cash and other evidence

seized during a stop of Garnes at the Los Angeles International Airport; and (iii) evidence seized from Garnes during a search incident to his arrest. Because Garnes raises only the first issue on appeal, we limit our discussion to the evidence and rulings on that issue.

1. The Government's Evidence

FBI Special Agent Charles Gianturco testified that, on August 11, 1988, he led a team of FBI agents and New York City Police Officers to Garnes' apartment at 2727 Surf Avenue, Brooklyn, New York (the "Apartment") to execute a warrant for Garnes' arrest. At approximately 6 A.M., Agent Gianturco and eight others positioned themselves outside the Apartment door. All of the men carried weapons, including one shotgun, and wore clothing identifying them as law enforcement personnel. (H. 6-8).[1]

Once the agents were in position, an agent stationed outside the building telephoned the Apartment, and reported to Agent Gianturco that a woman had answered the phone, saying that Garnes was not in. As soon as Agent Gianturco got that information, he knocked loudly on the Apartment door, announced himself as FBI, and told the occupant to "open the door." (H. 9-10). Within seconds, a woman later identified as Garnes' girlfriend Carmen Ayala opened the door, clad in sleepwear. Agent Gianturco asked Ayala whether Garnes was inside, and she replied that he was not. At that point, Agent Gianturco and the others had their weapons drawn and pointed toward the floor. (H. 11). Following Ayala's reply, all eight agents entered the Apartment, and all but Agent Gianturco swept through the Apartment looking

1 Citations in the form "H. ____" are to pages of the transcript of the suppression hearing.

for Garnes in "those particular areas where he could hide." (H. 11). Neither Garnes nor any of the items later seized from the Apartment were found during the sweep, which took approximately two minutes. (H. 12). By the time the sweep was completed, all the agents had holstered their weapons. (H. 14).

While the other agents were looking for Garnes, Agent Gianturco holstered his gun and accompanied Ayala and her five year-old child into the living room area, telling Ayala, "why don't you come in here and let the agents check and make sure that [Garnes] isn't in." (H. 13-14, 16). After Ayala and her child were seated together, unrestrained, on a couch, Agent Gianturco told Ayala that he had a warrant for Garnes' arrest, but had no warrant for her. Agent Gianturco asked Ayala whether she knew Garnes' whereabouts, and she replied that he usually got home at around 6 or 6:15 A.M. She also said that she had called Garnes' brother's home at around 3 A.M., but that Garnes had not been there. (H. 15). At some point, Agent Gianturco asked Ayala whether there were any guns or drugs in the Apartment, and Ayala replied that there were. (H. 13). Agent Gianturco then asked Ayala whether he could have her permission to search the Apartment, and she said, "yes." (H. 13).

After agreeing to allow a search, Ayala said that there were guns in the bedroom, and led Agent Gianturco there. Once there, Ayala pointed to a closet and said that the guns were "up there." Agent Gianturco directed other agents to search the closet, and asked Ayala whether there were any more guns or drugs in the Apartment. (H. 17-18). Ayala replied, "yes, in the kitchen," and led Agent Gianturco to that room. Once there, she pointed to a cabinet and said, "there is some in there." At that point, Agent Gianturco directed other agents to

search the cabinet, and returned to the living room with Ayala. (H. 17-18).

Agents seized five fully or partially loaded firearms and ammunition from the bedroom closet, and a loaded handgun, ammunition, heroin and crack from the kitchen cabinet. (H. 18-19). No items were seized from any other area of the Apartment, although other areas were searched. (H. 19). The search took approximately one hour, and the agents were inside the Apartment for a total of approximately one and a half to two hours. (H. 19-20).

While the search was underway, Ayala telephoned her mother and asked her to come to the Apartment, which she did. After the mother arrived, she told Agent Gianturco that Ayala recently had received psychiatric treatment and had been physically abused by Garnes. (H. 21).

During the time that the agents were at the Apartment, they had no physical contact with Ayala or her child, nor was Ayala ever restrained in any way. Agent Gianturco was the only one who asked Ayala any questions, and he spoke in a conversational tone. (H. 15). Although Agent Gianturco at one point advised Ayala that he could "put the guns and drugs on her if he wanted to," and discussed the possibility of her arrest by phone with a prosecutor and another agent, those conversations took place following the search. Prior to the search, Agent Gianturco did not threaten Ayala with arrest, nor did he make any promises of lenity toward her or Garnes. (H. 30-31, 44-45).

During the entire time agents were there, Ayala was calm and cooperative and did not cry or behave in an unusually emotional or inappropriate manner. (H. 16). Similarly, she did not appear to be under the influence of

drugs or suffering from any physical or intellectual disability. (H. 21-22, 44). Following the search, the agents left the Apartment, without arresting Ayala. (H. 20).

2. Garnes' Evidence

Garnes called Ayala, who testified that she and Garnes had lived together at the Apartment for three years. (H. 109). At approximately 6 A.M. on August 11, 1988, Ayala heard a knock on the Apartment door, and heard someone say, "FBI, open the door right now." She grabbed a robe and opened the door, and approximately ten agents entered the Apartment, with guns drawn and at their sides, pointing downward. As Ayala opened the door, one agent asked whether Garnes was inside, and said that they had a warrant for his arrest. When Ayala asked what the warrant was for, the agent "said something about murder." (H. 101-02).

Immediately after the agents entered the Apartment, they went into its various rooms, "looking for Mark first," then "searching the house." (H. 101, 112-13). As the other agents searched, one agent told Ayala to go into the living room, because he wanted to talk to her; once there, Ayala sat with the agent at a table, while Ayala's daughter sat on a nearby couch. The agent did not push, strike or handcuff Ayala, nor did he threaten her with his gun. (H. 101-03).

While seated at the table, the agent asked Ayala where Garnes was, and she replied that she did not know, and had been trying to contact him. The agent asked whether there were any guns or drugs in the Apartment, and Ayala replied that she did not know of any. (H. 103-04). The agent never asked Ayala for permission to search the Apartment; instead, the agents started searching, after first "looking for Mark," immediately following

their arrival in the Apartment. (H. 104-05, 112-13). At one point about 15 minutes into the search, Ayala went to the bathroom, and saw agents searching the other rooms of the Apartment. (H. 113). After the agents found the guns and drugs, the agent who had spoken with Ayala in the living room took her to the bedroom and kitchen, and showed her where the items had been found. (H. 105). At some point, the agent told Ayala that if she cooperated, she would not be arrested. (H. 106).

Ayala, who testified that she had a tenth grade education, also testified that she had been hospitalized for psychiatric reasons three years earlier, and regularly took a medication that "calms her nerves;" however, she had not taken any on August 11, 1988. (H. 97, 107-08).

3. The Court's Ruling

Following Ayala's testimony, the court suggested to her that "it might be more helpful to [Garnes] if you told the truth than if you lie," but Ayala insisted that she had testified truthfully. (H. 123). After Ayala was excused, the court stated that Ayala's testimony was "largely incredible" and rejected her claim that she never consented to the search. (H. 155-56). The court then stated:

> I don't have her testimony as to why she consented to the search. That is . . .. her testimony was that she never consented. So I don't have—which I don't accept either. So to that I don't have anybody telling me, I consented, but I did it because, you know I was afraid. I mean I—I basically almost have to find or fill in that blank that is not provided by the person whose [consent] was allegedly obtained in an improper way . . . . I mean if she came in, and if I believed her, and said in effect, I was scared. There were all of these circumstances, which I don't have to go into now, I just felt that I had to consent, and if that were the testimony and I believed it, I would grant the motion. But, you know, I don't have that. And in part I don't have the basis on which to fill it in.

(H. 156).

The Court went on to note that the issue was not "whether [Ayala] was making some sort of a waiver of her rights, but . . . was her consent the product of coercion by explicit or implicit means, by implied threat or covert force." (H. 157). After expressly crediting the testimony of Agent Gianturco, the court denied Garnes' motion, finding that Ayala, who was uneducated but "street smart," "readily agreed" to allow the search, possibly because she understood that she was incriminating Garnes, rather than herself. (H. 157-58).

C. The Trial[2]

1. The Government's Evidence

The government's evidence came from several sources. First, an accomplice, Viola Nichols, testified and offered direct evidence of Mark Garnes' participation in Gibbs' drug operation. Nichols' testimony was corroborated by approximately 34 conversations intercepted during a

2 Garnes was first tried in September 1989; however, that trial ended in a mistrial as a result of press reports regarding Gibbs and Garnes' heroin supplier, Lorenzo "Fat Cat" Nichols. After Garnes moved unsuccessfully to bar a retrial on double jeopardy grounds, he was tried again and convicted. All citations in the form "T. ____" refer to proceedings at the second trial.

court-authorized wiretap on her home telephone, and searches of Garnes and his apartment.

a. Nichols' Role in the Organization

Viola Nichols met Brian Gibbs in January 1988, following her release from New York State prison. At that time, Gibbs already was a close associate of Lorenzo Nichols, whom Gibbs had met while incarcerated. By the time Viola Nichols met Gibbs, he was operating a retail drug operation in Brooklyn, along with Garnes and others, including Herman Brothers, a/k/a "Herms." Nichols asked Gibbs for a job in his operation and, after obtaining approval from Lorenzo Nichols, Gibbs agreed to give Nichols a job packaging heroin. (T. 87-88).

In late January 1988, Gibbs delivered a quantity of heroin to Nichols at her Jamaica, Queens home, along with packaging paraphernalia, including baggies, rubber bands, and rubber stamps bearing Gibbs' "brand names," one of which was "Hit Man." (T. 89-90). After Gibbs left, Nichols contacted a neighborhood drug dealer, who showed her how to package the heroin. Thereafter, Nichols worked packaging heroin for Gibbs several times a week, until July 1988. During that period, heroin was generally delivered to Nichols and picked up by Garnes, although Herman Brothers sometimes also made deliveries. In addition, Garnes generally paid Nichols for her work, at rates ranging from $600 to $300 per ounce of heroin. (T. 89-94, 104, 108).

b. Nichols' Contacts with Garnes

Viola Nichols was in almost daily contact with Garnes between February and late July 1988. They spoke frequently by telephone, often several times a day, and he often visited her house, usually arriving in a Volvo or on a motorcycle, to deliver drugs or money. (T. 100-103). On other occasions, Garnes visited Nichols' house to socialize with Linda Rodway, a Queens woman who sometimes helped Nichols bag heroin. (T. 105-06).

During their numerous conversations, Garnes and Nichols discussed various aspects of Gibbs' operation. Garnes told Nichols that the heroin was sold in Brooklyn and that he was responsible for supplying the "spots." To simplify that task, Garnes told Nichols, he kept a supply of narcotics in his Brooklyn apartment, where he lived with a girlfriend, Carmen Ayala. (T. 93-94, 96). When Nichols asked Garnes one day about a large quantity of crack that he was carrying, he explained that he and Gibbs also sold crack. (T. 96-97). Also, whenever Garnes came to Nichols' home to deliver or pick up narcotics, he carried a gun; Nichols saw him with different guns on different occasions. (T. 97, 111-13).

Garnes was intercepted in a number of wiretapped conversations in which he, Nichols, Gibbs and others discussed their drug business, sometimes in a Pig-Latin type slang. (T. 113-14). In many of those conversations, Garnes called Gibbs and others from Nichols' home; other times, Nichols and Garnes spoke by phone. Those conversations corroborated Nichols' testimony concerning Garnes' role in Gibbs' organization. For example, on March 18, 1988, Nichols told Garnes in Pig-Latin that she needed a rubber stamp of the sort used to stamp "brand names" on packages of heroin. Garnes replied, "Es-yay, es-yay, ou-yay onna-gay it-gay on-way. OK? [Yes, yes, you gonna get one.]". (GA. 2, T. 135).[3]

Garnes also frequently discussed Nichols' "job" over her phone. For example, on June 3, 1988, Garnes, who

3 Citations in the form "GA" are to the Government's Appendix submitted with this brief. Citations in the form "AA" are to the Appendix submitted by appellant Garnes.

was at Nichols' home, telephoned Gibbs and told him that Nichols was demanding $750 for work that she had done. Gibbs asked Garnes whether Nichols, who was bagging heroin at the time of the call, had "finished." After Garnes replied, "Naw, naw, not quite," Gibbs said, "Tell her when she finished, I'll see her." Garnes then told Nichols, "When you finish that thing, we'll see you." (GA. 6, T. 153).

On the night of June 3, 1988, Garnes, who was still at Nichols' house, discussed the heroin she was bagging. After Nichols said, "I'm gonna tell you something. After I do this right here . . ," Garnes replied, "You're gonna do the rest." Nichols responded, "Oh, I know I am. I'm gonna do it tonight. But this on the table. If I bag . . . a thousand dollars and I put the rest of it in bags . . ." Garnes replied, "Then you can do 'em tomorrow." (GA. 8-9, T. 158-59).

At one point in June 1988, the Gibbs organization had difficulty obtaining heroin from its sources. Nichols discussed the problems several times with with Garnes and Gibbs. For example, on June 16, 1988, Nichols asked Garnes, "Shit, why don't you all buy some from somewhere?" When Garnes failed to reply, Nichols volunteered to go "uptown" to pick up drugs, saying, "I ain't never scared to go pick up no, no drugs. I used to go pick up ten, twenty damn keys." (GA. 19-20, T. 175).

Nichols stopped working for Gibbs and Garnes in July 1988, after they accused of her of tampering with some of their heroin. Nichols discussed the situation with both Gibbs and Garnes in several recorded conversations. For example, on July 26, 1988, Nichols asked Garnes whether she was going to be "wi-zerking [working]." Garnes replied that it was up to Gibbs, then complained that their drugs were not selling, and that Gibbs

"still got shit piled up. The same shit you gave us. The shit's fucked up. Nobody wants it." Nichols replied, "Picture me gonna do something like that. I ain't gonna cut off the . . . hand that feed me." (GA. 41-42, T. 197-98).[4]

c. The Los Angeles Airport Stop

Los Angeles County Deputy Sheriff Robert Mallon, who was assigned to a drug and currency task force at the Los Angeles International Airport, testified that he stopped Garnes and two companions there on June 9, 1988. After Garnes produced an identification card and airline ticket in different names, Deputy Mallon asked Garnes whether he was carrying any large sums of cash or drugs.[5] When Garnes replied that he was not, Deputy Mallon asked for and received permission to search Garnes' shoulder bag. Inside the bag, Deputy Mallon found $31,295, mostly in small bills. (T. 321-23).[6]

d. The Jewelry Purchase

Manhattan jeweler Peter Marsten testified that, in the second week of June 1988, Garnes purchased custom-made jewelry from him for a total of $4,825. Garnes paid for the jewelry in cash. However, after an initial down

4 In addition to the calls linking Garnes to drug trafficking, there were also several calls indicating that he lived in the 2727 Surf Avenue apartment with Carmen Ayala. For example, on June 10, 1988, Garnes, who was at Nichols' home, called Ayala at the Apartment. Garnes told Ayala that he had to take care of some things, "then I'm coming home." (GA. 15).

5 The identification card listed Garnes' address as 2727 West 28th Street, Brooklyn, New York. (T. 321). That is another address for the building at 2727 Surf Avenue. (T. 353).

6 Garnes told Viola Nichols about the currency seizure (T. 110-11), and, in a wiretapped conversation on June 16, 1988, Nichols discussed the seizure with Gibbs, who said that "Country" had "fucked up a lot of motherfucking paper [money]." (GA. 23, T. 177-78).

payment, he told Marsten that "he had a problem that he said happened in L.A. that he wouldn't be able to pay me so quickly." (T. 218).

e. The Search

FBI Special Agent Charles Gianturco testified regarding the search of the Apartment.[7] Agent Gianturco's testimony was substantially the same as that at the suppression hearing, except that he did not testify on direct examination about statements made to him by Garnes' girlfriend, Carmen Ayala. On cross-examination, however, Garnes' counsel elicited the following testimony:

> Q: Now, you testified too that in the course of your investigation while you were in the apartment, Carmen Ayala said that the guns and drugs belonged to Mark Garnes, is that what she said?
>
> A: Correct.
>
> Q: She orally told you that, correct?
>
> A: Yes.
>
> Q: You have been an FBI agent 12 years?
>
> A: Correct.
>
> Q: Did it ever dawn on you to write it down in writing and have her sign a statement that the guns—the guns and drugs in that apartment belonged to Mark Garnes?

(T. 373).

7 In addition, FBI Special Agent Kevin Morrissey testified that some of the heroin seized was inside packets stamped "Hit Man." (T. 392).

After counsel asked Agent Gianturco several more times whether it would have been good practice to obtain a written statement from Ayala regarding Garnes' ownership of the drugs and guns (T. 374-75), counsel attempted to impeach Ayala's reliability by eliciting testimony regarding her alleged psychiatric problems. (T. 375). At that point, the court held a sidebar, at which the following exchange took place:

> THE COURT: I want to be sure I heard correctly during the direct examination. Did he testify that she told him that the guns belonged to Mark Garnes?
>
> MS. CALDWELL: No, he did not.
>
> THE COURT: That's what I thought.
>
> MS. CALDWELL: He testified to that in the suppression hearing.
>
> THE COURT: I know.
>
> MR. JENKS: We both [counsel and Garnes] thought she said the guns and drugs belonged to Garnes.
>
> THE COURT: Did she say that?
>
> MS. CALDWELL: She did but he did not say that today.
>
> MR. JENKS: Not today. We both thought that he did. That's why we are asking the questions.

(T. 376).

Following that exchange, the court asked defense counsel how he wished to proceed and counsel replied that he preferred to let the matter drop. (T. 379-80). The court then directed the government not to mention

Agent Gianturco's reference to Ayala's statement in its summation. (T. 379).

The following day, the court struck a portion of Agent Gianturco's testimony, telling the jury:

> Ladies and gentlemen, before we begin . . . Agent Gianturco testified with respect to conversations, certain conversations that he had with Carmen Ayala, who occupied the apartment where he went to make the arrest of the defendant. Those conversations are not relevant to this case and I am striking that testimony and you should disregard any testimony about any conversation that Agent Gianturco had with Carmen Ayala relating to the consent to search or anything else. It is irrelevant. Strike it. Don't consider it in reaching a verdict in this case.

(T. 409).

2. The Defense Case

Garnes called one witness, Linda Rodway. Rodway, who had been riding a motorcycle with Garnes at the time of his arrest on August 11, 1988 (T. 337-39), testified that she met Garnes at Viola Nichols' house in March 1988, and they began dating. (T. 447). Rodway said that she frequently went to Nichols' home and smoked cocaine, while Nichols smoked crack; Rodway also helped Nichols bag heroin. (T. 452). While at Nichols' home, Rodway frequently saw numerous people whom she knew to be drug dealers, including Gibbs. (T. 457-58). Although Garnes also was a frequent visitor to Nichols' home, sometimes in the company of Gibbs, Rodway never saw Garnes with drugs. (T. 448, 458).

3. The Court's Charge

During its charge, the court referred again to the fact that it had stricken a portion of Agent Gianturco's testimony. In its general charge regarding what type of evidence the jury could consider, the court told the jury that it could not consider evidence that had been stricken. The court said:

> In that regard, I call your attention to the fact that I struck certain testimony of Agent Gianturco relating to conversations that he had with Carmen Ayala at the time the arrest warrant was sought to be executed. You should disregard that testimony and pay no attention whatever to it in reaching your verdict.

(T. 526).

D. The Post-Trial Motions

Following his conviction, Garnes moved for a new trial on the ground that he was denied effective assistance of counsel as a result of his attorney's questions to Agent Gianturco. Garnes claimed, as he does here, that Agent Gianturco's testimony was devastating, as it provided a crucial link, about which there otherwise allegedly was a reasonable doubt, between Garnes and the contraband found in his apartment.

Following argument, the court denied Garnes' motion, ruling that:

> I'm going to deny that motion as I have indicated, Mr. Garnes, I think he represented you competently. There was that one incident at the trial which probably

> falls into the realm of incompetence, but I don't think that it would have made the slightest bit of difference in the jury's verdict. If I did, I would set aside the verdict. The evidence was so overwhelming that it would have taken a miracle to have resulted in a not guilty verdict in this case.

(AA. 33).

Garnes also moved for a new trial on the ground that his motion to suppress the evidence seized from the Apartment should have been granted. Garnes' arguments were virtually identical to those raised here. Specifically, he claimed that given Ayala's age, her lack of education, her alleged psychiatric problems, the time of day, and the fact that she consented to a search following a security sweep—which she might have confused with a search—by armed agents, her consent was merely "acquiescence in the face of authority," and was void. Indeed, Garnes claimed, as he does again here, that "any reasonable person under these circumstances would believe that his or her consent was irrelevant, as the agents were going to continue their search whatever she said." (GA. 45-46).

The district court denied Garnes' motion, first stating that, although Ayala had falsely denied giving consent, it nonetheless was required to consider the possible effect of the agents' conduct on her psychological state. (AA. 28). After noting that the "question is whether she believed if she said no they would have gone ahead and searched anyway," the district court noted that the agents expressly told her that the purpose of the security sweep was to look for Garnes. Moreover, Ayala's own testimony that the agents went "looking for Mark first" indicated that she understood that the sweep had a limited purpose. Given the circumstances, the district court held:

> I find that the government has met its burden of establishing that the consent was voluntary, as the Supreme Court has used that term. As I indicated in my earlier opinion there was no force, coercion, no one threatened her. Although they entered with guns drawn, the testimony of the agent and Carmen Ayala both confirmed that the guns were not pointed. They were pointed downward. They told her that they were going to look through the apartment for Mark Garnes, they did not search or seize any physical evidence before she consented, they asked for her consent to search, she readily gave it, and I find that her consent was not simply an acquiescence to authority in the sense that the Supreme Court has used that term. . . .

(AA. 32-33).

ARGUMENT

POINT ONE

THE DISTRICT COURT PROPERLY DENIED GARNES' MOTION TO SUPPRESS

Garnes challenges the district court's finding that Ayala's consent to search was voluntary. He contends that Ayala's consent was merely acquiescence in the face of authority, because it came after a security sweep by armed agents, when "any reasonable person . . . would believe that his or her consent was irrelevant, as the

gents were going to continue their search whatever she aid." (Br. at 21). Garnes points to additional factors hich he claims negate the finding of voluntariness, amely Ayala's alleged psychiatric problems, her limited ducation and the fact that she was not told that she ould refuse consent. Garnes' argument is unsupported y the record and is wrong.

As an initial matter, Garnes' arguments are identical o those raised and rejected below. This Court must, of ourse, uphold the district court's factual findings so ng as they were not clearly erroneous. *United States v. uglisi*, 790 F.2d 240, 244 (2d Cir.), *cert. denied*, 479 U.S. 27 (1986); *United States v. Mast*, 735 F.2d 745, 749 (2d ir. 1984); *United States v. Ramirez-Cifuentes*, 682 F.2d 37, 344 (2d Cir. 1982). Moreover, when, as in this case, ne district court's factual findings rest largely upon its ssessment of the credibility of the witnesses who testi- ed at the suppression hearing, this Court's review is ven more circumscribed. *United States v. Zapata-amallo*, 833 F.2d 25, 27 (2d Cir. 1987); *United States v. uglisi*, 790 F.2d at 243.

In this case, the record fully supports the district ourt's finding that, notwithstanding Ayala's testimony o the contrary, she "readily agreed" to allow a search of ne Apartment; indeed, Garnes implicitly concedes the ct of Ayala's consent. The record also firmly supports ne district court's other conclusion, that Ayala's consent as voluntary, rather than a product of coercive police nduct.

It is well-established that a valid search of a premises ay be made without either a warrant or probable cause a person in control of the premises voluntarily con- nts. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 973). The government has the burden of showing by a

preponderance of the evidence that the consent was "voluntarily given, and not the result of duress or coercion, express or implied." *Id.*; *accord*, *United States v. Arango-Correa*, 851 F.2d 54, 57 (2d Cir. 1988). The test of voluntariness is whether the consent was the product of an essentially free and unconstrained choice by its maker [citation omitted], and is a question of fact to be determined from all of the surrounding circumstances." *Arango-Correa*, 851 F.2d at 57.

In examining the "totality of the circumstances," the district court must determine from the evidence all the circumstances surrounding the consent, assess the psychological impact of those circumstances on the consenting party, and evaluate the legal significance of the party's reactions. *Schneckloth*, 412 U.S. at 226. *Accord*, *United States v. Sanchez*, 635 F.2d 47, 61 (2d Cir. 1980). Indeed, even when the consenting party has deliberately given false testimony denying consent, the court nonetheless should consider the possibility that the circumstances "may have led [the party] to believe that the officers had the right and intention to search [her] apartment even if [s]he did not consent." *Sanchez*, 635 F.2d at 47.

Factors to be considered in assessing the voluntariness of consent include whether and for how long the consenting individual was in custody at the time of consent; the nature and duration of any pre-consent interrogation; the behavior of law enforcement agents prior to obtaining consent, including whether guns were drawn or the consenting individual was frisked, threatened or promised lenity; whether the consenting individual was advised of the option to refuse consent; whether the consent was obtained in a public or private area; the consenting individual's physical and mental condition at the time of the consent; the individual's age, intelligence, level of educa-

tion and prior experience with the law; and any assistance provided in connection with the search. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. at 226; *Arango-Correa*, 851 F.2d at 57; *Puglisi*, 790 F.2d at 243. No one factor is dispositive; indeed, courts have found consents voluntary despite the presence of one or more factors that might indicate involuntariness. *See* cases cited at p. 26, *infra*.

Applying this, it is clear that the district court was correct in finding Ayala's consent voluntary. Notably, despite Ayala's false testimony denying consent, the court nonetheless expressly and thoroughly considered all the circumstances surrounding the consent to determine whether they "may have led [Ayala] to believe that the [agents] had the right and intention to search [her] apartment even if [s]he did not consent." *Sanchez*, 635 F.2d at 47. After correctly finding that the "question is whether she believed if she said no they would have gone ahead and searched anyway," the district court noted that the agents behaved professionally throughout their encounter with Ayala, and that:

> there was no force, coercion, no one threatened her. Although they entered with guns drawn, the testimony of the agent and Carmen Ayala both confirmed that the guns were not pointed. They were pointed downward.

(AA. 32-33).

Significantly, the agents also expressly told Ayala that the purpose of the security sweep was to look for Garnes. Moreover, Ayala's own testimony that the agents went "looking for Mark first" indicated that she understood that the sweep had a limited purpose. Once the security sweep was completed, Ayala and her child

remained unrestrained and Ayala was told that the agents had no warrant for her arrest. In addition, Ayala assisted the agents in their search, leading them to all the guns and drugs in the apartment. Finally, during the entire time the agents were there—which did not exceed two hours—Ayala appeared calm, cooperative and to fully understand what was occurring. Given these factual findings, grounded in the court's assessment of credibility, the district court was plainly not clearly erroneous in concluding that Ayala's consent was voluntary.

The finding of voluntariness is not undermined by Ayala's lack of education and Garnes' claim that she had "deep psychiatric problems" and used prescription drugs. Although Garnes argues that, due to those factors Ayala could not have been expected "to intuit the vagueries of Fourth Amendment law and understand that the initial two-minute search was merely a 'sweep' of areas where a person might be secreted, and that any more intimate search required her consent" (Br. at 21), consents have been found voluntary notwithstanding that the consenting party was uneducated, *e.g., United States v. Mendenhall*, 446 U.S. 554, 558 (1980) (plurality opinion) (22 year-old with 11th grade education capable of valid consent); *United States v. Gonzales*, 842 F.2d 748, 755 (5th Cir. 1988) (defendant with sixth grade education who had no trouble communicating with police capable of valid consent); or was in a possibly vulnerable subjective state, *e.g., United States v. Boston*, 508 F.2d 1171, 1178-79 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975) (defendant's girlfriend validly consented to search of her apartment although alone with children and clad only in robe when confronted in early morning by four armed agents); *United States v. Gay*, 774 F.2d 368, 377 (10th Cir. 1985) (consent valid when defendant mentally aware and answered questions, despite intoxication).

In any event, the district court expressly considered Ayala's level of intelligence and tenth grade education, concluding that, although uneducated, Ayala was "street smart" and "not dumb" (H. 157), and was "perfectly capable of understanding what was going on." (AA. 25). As to Ayala's alleged "deep psychiatric problems" and use of prescription drugs, Garnes' exaggerated description of those conditions and his claim that either affected Ayala's ability to consent to a search have no basis in the record. Indeed, the only evidence of any psychiatric problem was Ayala's mother's statement to Agent Gianturco, and Ayala's own testimony, that she had been treated three years earlier, partly as a result of physical abuse by Garnes. Similarly, although Ayala said that she took prescription medicine, she had taken none on the day of the search, and behaved normally throughout her encounter with the agents.

Nor is it dispositive that Ayala was not told that she could refuse consent. *E.g.*, *Schneckloth*, 412 U.S. at 248-49 (consent valid although person was not advised of the option to refuse consent); *United States v. Crespo*, 834 F.2d 267, 271 (2d Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988) (consent valid although defendant first arrested, frisked and handcuffed, and never advised of right to refuse).

In sum, given the absence of coercive police tactics that Ayala could "reasonably [have] viewed as the exercise of authority" to search, or credible testimony indicating that she believed that she had no choice other than to consent, *Sanchez*, 635 F.2d at 61, Garnes cannot seriously contend that the district court's ruling was clearly erroneous. *See Schneckloth*, 412 U.S. at 247. *Compare Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) (exclusionary rule inapplicable to items voluntarily delivered to police by defendant's wife, unless "some type of

unconstitutional police conduct occurred"). Indeed, under these circumstances, the opposite conclusion would have been clear error. As the district court suggested, Ayala's consent may have been the product of many factors, including her understanding that she was incriminating Garnes, rather than herself. As the Supreme Court has recognized:

> [t]here no doubt always exist forces pushing [a] spouse to cooperate with the police. Among these are the simple but often powerful convention of openness and honesty, the fears that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse. But there is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure or active cooperation with the police.

Coolidge v. New Hampshire, 403 U.S. at 488.

POINT TWO

GARNES RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Although Garnes apparently concedes that his counsel's performance was otherwise competent (Br. at 29), he claims that a single error during cross-examination of Agent Gianturco was sufficient to "undermine confidence in the outcome" of the trial. (Br. at 30). According to Garnes, the testimony elicited—that Ayala indicated that the drugs and guns in the apartment belonged to Garnes—supplied a crucial link between Garnes and the Apartment, which was otherwise weak or missing. Also, Garnes claims that the district court's order striking the

evidence and the court's charge were a "cure . . . worse than the disease," serving merely to highlight Agent Gianturco's testimony. (Br. at 28-30). Garnes' argument is without merit.

To obtain reversal of his conviction, Garnes must show both that "his attorney's conduct fell below an objective standard of reasonableness [citation omitted], and that but for his attorney's unprofessional errors, the result of the proceeding would have been different." *United States v. Reiter*, 897 F.2d 639, 645 (2d Cir.), *cert. denied*, 111 S. Ct. 59 (1990). *Accord, e.g., Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). The right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (Stevens, J., concurring).

As the district court found and Garnes apparently acknowledges on appeal, counsel's overall representation was entirely competent. Counsel employed a private investigator to assist him, moved before trial for suppression of evidence, vigorously cross-examined government witnesses, made appropriate and timely objections, and presented the jury with alternative theories of the case in summation. Also, as the district court pointed out, Garnes' counsel "attempted to do what any competent lawyer does in the face of . . . overwhelming evidence which is to possibly negotiate a plea." (AA. 35).

In addition, although counsel admittedly made an error in eliciting the testimony from the agent, the single error was not so egregious and prejudicial as to be "of constitutional dimension." *United States v. DiTommaso*, 817 F.2d 201, 216 (2d Cir. 1987). First, the district court struck the testimony and twice directed the jury to disregard it. Garnes is wrong to claim that it was "naive, at best" to think that the jury would follow the court's instructions. (Br. at 30). This Court has repeatedly stated that, in the absence of proof to the contrary, juries are presumed to follow the court's instructions. *E.g., United States v. Tussa*, 816 F.2d 58, 68 (2d Cir. 1987); *United States v. Ebner*, 782 F.2d 1120, 1126 (2d Cir. 1986). Garnes presents no such proof here.

Second, even assuming *arguendo* that counsel's error constituted ineffective assistance, the error was harmless. As the district court found, counsel's error did not make "the slightest bit of difference in the jury's verdict," as "the evidence was so overwhelming that it would have taken a miracle to have resulted in a not guilty verdict in this case." (AA. 33). While Garnes glosses over the government's proof, casually referring to the accomplice's "dubious (to put it mildly) integrity and reliability" and the absurd possibility that the taped conversations may have involved someone other than Garnes (Br. at 29), even a cursory examination of the record shows that the district court correctly described the proof of Garnes' involvement in drug trafficking as overwhelming. In addition to Viola Nichols' testimony, Garnes himself was overheard in numerous wiretapped conversations discussing drugs in explicit terms. Also, Garnes had or spent more than $36,000 in cash during a two-week period in June 1988. Finally, large quantities of crack, heroin and firearms were found inside Garnes' apartment, whose only other occupants were Carmen Ayala and a five-year old child.

More to the point, contrary to Garnes' assertions, Agent Gianturco's testimony did not supply an otherwise weak or missing link between Garnes and the drugs and guns in the Apartment. First, the heroin seized there bore a brand name that Viola Nichols testified was used

by Gibbs' organization, "Hit Man." Garnes was identified as a member of that organization. Also, and more damning, Garnes carried an identification card bearing his name and photograph, and the address of the Apartment, both when he was stopped at the Los Angeles Airport and at the time of his arrest. Finally and even more compelling, Garnes was overheard in wiretapped conversations speaking to Ayala about plans to "come home" to the Apartment after finishing other business.

In short, given this evidence, there was virtually no doubt of Garnes' guilt of all the charges in the indictment, and "no view of the desireable and pristine image of law requires a second . . . trial where the *outcome would unquestionably be the same.*" *United States v. Reiter*, 897 F.2d at 645 (emphasis in original) (citation omitted).

CONCLUSION

For the foregoing reasons, Garnes' conviction should be affirmed.

Dated: Brooklyn, New York
May 8, 1991

Respectfully submitted,

ANDREW J. MALONEY,
United States Attorney,
Eastern District of New York.

EMILY BERGER,
LESLIE R. CALDWELL,
Assistant United States Attorneys,
Of Counsel.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF FOR THE UNITED STATES BY MAIL ON MAY 13, 1991.

Richard Ware Levitt, Esq.
148 East 78th Street
New York, New York

/s/ MATTHEW E. FISHBEIN
MATTHEW E. FISHBEIN
Chief, Appeals Division

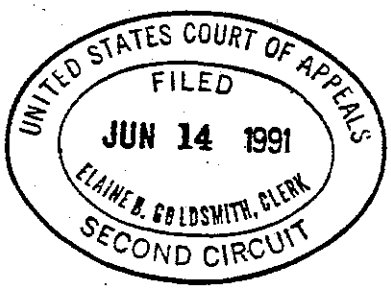
JON GA 25 EDNY 88-cr-496 KORMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of June, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE WILFRED FEINBERG,
HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.



- - - - - - - - - - - - - - -
UNITED STATES OF AMERICA,
Appellee,

v. 91-1041

MARK GARNES,
Defendant-Appellant.
- - - - - - - - - - - - - - -

O R D E R

Mark Garnes appeals from the January 4, 1991, judgment of the District Court for the Eastern District of New York (Edward R. Korman, Judge) convicting him after a jury trial of conspiracy to distribute heroin, in violation of 21 U.S.C. § 846 (1988), possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1988), and using and carrying firearms during and in relation to drug trafficking crimes, in violation of 18 U.S.C. § 924(c)(1) (1988). Garnes contends on appeal that drugs and guns from an apartment shared with his girlfriend were seized in violation of the Fourth Amendment and that he received ineffective assistance of counsel because his attorney elicited damaging testimony linking him to the seized contraband.

The District Court's determination that Garnes' girlfriend, Carmen Ayala, voluntarily consented to the search of the apartment finds support in the record. A team of nine FBI agents and police

officers had gone to Garnes' apartment at 6 a.m. to execute a warrant for Garnes' arrest and, when Ayala indicated that he was not in, searched the apartment, with weapons drawn and pointed at the floor, in "those particular areas where he could hide." While the others searched the apartment, Agent Gianturco, after holstering his gun, told Ayala that the others were searching to "make sure that [Garnes] isn't in" and that their arrest warrant did not extend to her. Gianturco then asked whether there were guns or drugs in the apartment and whether they could search for them. Ayala replied, "yes." At no point was Ayala physically restrained. At the suppression hearing, Ayala expressed the understanding that the agents and officers "went looking for Mark first." Under these circumstances, the District Court was entitled to find that Ayala understood the difference between the agents' and officers' authority to search for Garnes and their request to search for the guns and drugs. Their failure specifically to inform Ayala that she could refuse their request does not invalidate her consent.

Garnes' contention that he was denied effective assistance of counsel also lacks merit. In cross-examining Gianturco, Garnes' attorney elicited the testimony that Ayala had told the officers that the guns and drugs belonged to Garnes. He asked about her statement in the mistaken belief that Gianturco had given this testimony in his direct examination, whereas in fact the testimony was given at a pretrial hearing. This isolated lapse is not "sufficiently egregious and prejudicial," Murray v. Carrier, 477 U.S. 478, 496 (1986) (citations omitted), to be "of constitutional dimension." United States v. DiTommaso, 817 F.2d 201, 216 (2d Cir. 1987). Attorneys not infrequently elicit unfavorable testimony on cross-examination and, in this case, any resulting prejudice was ameliorated by the District Court's curative instructions to the jury. In addition, there was other evidence that linked Garnes to the guns and drugs in the apartment,

U.S.A. v. Garnes
Docket No. 91-1041

including Garnes' identification card, which listed the apartment's address, and wiretapped conversations in which Garnes told Ayala of plans to "come home." In sum, the conduct of Garnes' attorney did not fall below an objectively reasonable standard, and the testimony mistakenly elicited was unlikely to have changed the outcome of the trial.

The judgment of the District Court is affirmed.

Wilfred Feinberg

J. Daly

Ralph K. Winter

Circuit Judges.

N.B. This summary order shall not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

Docket No. 99-1524

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

AMOS, C.O. #1535, LOUISE COLEMAN, CAROL CRAFT, MARTHA CRAFT, CHAR T. DAVIS, MAN SING ENG, HOWARD MASON, BRIAN GIBBS, CLAUDIA MASON, IDA NICHOLS, JOANNE MCCLINTON NICHOLS, VIOLA NICHOLS, JOSEPH ROGERS, KAROLYN TYSON, WILSON SKINNER, MARCIA NICHOLS WILLIAMS, PARIS WILLIAMS,

Defendants,

MARK GARNES,

Defendant-Appellant.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF AND APPENDIX FOR THE UNITED STATES BY MAIL ON APRIL 3, 2000.

MARK A. GARNES PRO SE
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PETER A. NORLING
Chief, Appeals Division

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 99-1524

UNITED STATES OF AMERICA,

Appellee,

v.

MARK GARNES,

Appellant.

APPELANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

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17887

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PRELIMINARY STATEMENT

Appellant, Mark Garnes, here now replies to the Appellee's Brief in Opposition of Appellant's Appeal Brief.

Appellant received the Appellee's Brief of April 6, 2000, with the contentions that Appellant's claims are meritless. Appellant here illustrates that the appeal is not meritless, in that, the claims are valid. To which, the narcotic offenses should be granted a new trial or dismissed due to the firearm count being vacated by the district court. Appellant being denied effective assistance of counsel impaired appellant's rights under the United States Constitution during the trial and sentencing; and the one point enhancement on the criminal history category should be vacated accordingly.

Appellant here shall establish that the claims are valid and with merit, to which, the Court of Appeals for the Second Circuit should grant Appellant's claims, vacating the conviction and sentence, remanding to the district court to develop a full factual finding, de novo to each claim.

ARGUMENT

POINT ONE

APPELLANT'S CLAIMS ARE NOT PROCEDURALLY BARRED AND ARE WITH MERIT

The Appellee's contention is that Appellant did not raise the claim of 'prejudicial spillover' in his petition to the district court. The issue was raised in the argument, to which, Appellant notes in the Memorandum of Law in Support: "Should the firearm count be dismissed, counts one and two should be vacated on the grounds that "Retroactive Misjoinder" compels prejudicial spillover. **Appendix 2 - 3**

The Court of Appeals reversed in **United States v. Jones, 16 F. 3d. 487, 493 (2d Cir. 1994**, the government failed to prove the 'felon in possession' count, it would be unfair to allow the bank robbery convictions to stand . . . Prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice.

With great respect to the district court's jury instructions on the findings of guilty or not guilty to each count, here in the instant case, implies the law to be adhered in rendering the verdict. The instructions given are the law. Here today, the firearm count has been vacated, subjecting the verdict to scrutiny due to the instructions and the 'retroactive misjoinder' exposes the remaining counts to prejudicial spillover.

The firearm count was nullified by the district court on July 30, 1999.

There is no evidence to what the jury would consider regarding count three. Considering strongly the jury adhered totally to the district court's jury instructions, appellant presumes a verdict of not guilty on the remaining counts. The alternative is how to reconstruct the jury deliberations.

The Appellee further contends that the government, Hon. Korman, or counsel for appellant did not address the point earlier, therefore appellant waived the argument for direct appeal. The Appellee's contentions are meritless.

Notwithstanding that the issues were not addressed on the record by the parties present at the resentencing on July 30, 1999, does not make the issues mute. The issues are part of the 28 U.S.C. § 2255 that apprised the district court of Appellant's claims. The claims should not be deemed as waived, but reviewed de novo.

A sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines . . . Under this holistic approach, when a criminal sentence is vacated, it becomes void in its entirety; the sentence--including any enhancements has been wholly nullified and the slate is wiped clean. United States v. Stinson, 97 F. 3d 466, 469 (11th Cir. 1996).

Furthermore, a jury can not render a verdict on the evidence on a vacated count, nor may the government use such evidence therein a trial or re-trial. Evidence on a vacated count may be used for sentencing purposes only. United States v. Watts, 136 L. Ed. 554 (1997). Therefore, appellant meets

one principle of the Rooney test demonstrated by the Appellee. The admissibility of firearms as evidence in narcotics conspiracies is only to the extent as the underlying offense or fruits from a search, not a vacated count, only as cited in the Appellee's Brief, as an active count. (Page 13) The Court of Appeals in Jones, reversed, stating, "In short, the evidence that Jones is a felon was of the inflammatory sort that may have swayed the jury to convict him of the other charges even if the evidence had not supported the other charges." id. at 493

The firearm count would be held as compelling evidence on the drug counts at sentencing, not before a jury, the latter would be prejudicial, as it stands here now companioned with the vacated count.

Secondly, the evidence on the remaining counts is only overwhelming to the point that clarity is to be given to the testimony of government witness, Ms. Viola Nichols. To which, there are 14 calls used during the trial attributed to Appellant. Each call illustrates the amount of narcotics in question, no calls discuss firearms, nor addressing crack cocaine, the remaining evidence is profile evidence supportive of the Appellee's case. Absent the mention of firearms, the evidence is characterizing Appellant as a drug dealer, however, the agents, Robert Mallon from the LAX Airport seizure of the currency, arresting agents, nor the jeweler mentions the presence of a firearm. Considering a large amount of cash is possessed, with regard to Ms. Nichols stating I always carried a gun. The evidence being overwhelming is to be determine by the Court of Appeals here.

The Appellee's contentions are not valid, Appellant's claims may be adjudicated de novo to further develop a full factual finding on the issues.

POINT TWO

APPELLANT'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT PROCEDURALLY BARRED AND IS WITH MERIT AND SHOULD BE REVIEWED DE NOVO

The Appellee's contention are that **Plitman's** argument upon counsel's trial strategy to waive confrontation rights are sound. The instant case evinces otherwise, counsel's trial strategy and/or tactic was unsound, nor was counsel's sentencing strategem sound.

Appellee's, plausibly, procured an analysis at some point in time thereafter the substances in counts one and two were seized, resulting from the fruits of a 'consensual' search. Appellee's notes that the substances became known as heroin and crack as soon as chemically tested, a short time after being found in 'Appellants's' apartment. (Page 16)

The existing record before the district court does not include a Lab Report Analysis Result at any point during the preliminary proceedings, trial, sentencing. The Lab Report was not included as evidence especially at the trial to confirm the stipulation and the extent to what the chemist was to testify. Counsel failed to clarify the substance being congruent with the stipulation. Counsel during sentencing did

not produce the Lab Report Analysis to dispute the sentence to an unknown substance or validate the substance being 'unknown.'

It is well settled that a jury must find a defendant guilty beyond reasonable doubt based upon the preponderance of the evidence. Patterson v. New York, 432 U.S. 197, 53 L. Ed. 281, 97 S. Ct. 2319 (1977).

Counsel at sentencing did not produce nor address the 'unknown' substance therein the PSR, the preponderance of evidence standard is extended for sentencing purposes, in that, such standard is the proper measure to determine the burden of proof. McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986).

Appellant meets the requirements applied in Billy-Eko, in that, Appellant stated in his Reply to Respondent's Answer (28 U.S.C. § 2255), that none of the claims were raised on appeal, because [Appellant] was not familiar with the issues until some years later. Furtherin, [Appellant] received his entire file from appeal counsel sometime after the appeal. To which, the Antiterrorism and Death Penalty Act was not mandated until April 24, 1996, prior to this date, a 28 U.S.C. § 2255 could be submitted at any time. Heflin v. United States, 358 U. S. 415, 420 (1959). Appendix 4

Counsel's failure to submit the claims on appeal is unbeknownst to Appellant. Appellant being unfamiliar with the issues was due to the unavailability of his case file. "A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performances . . . consequently a criminal defendant will rarely know that he has not been

represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize claim until he begins collateral review proceedings. . . " id. at 321 A competent and skilled attorney perusing the transcripts and documents therein an assigned case is believed to notice claims that a layman would by-pass, such oversights constitutes a 'cause.'

Counsel's failure to raise the claims hereto were of constitutional dimensions, in which, the skilled eye would detect. ". . . an attorney's error constitute cause because, whereas tactical decision implies that counsel has, at worst, 'reasonably but incorrectly exercise[d] judgment,' ignorance or oversight implies that counsel 'fail[ed] to exercise it at all, in dereliction the duty to represent . . . Thus, in order to establish cause a federal habeas petitioner need only satisfy the district court 'that the failure to object or to appeal a claim was the product of his attorney's ignorance or oversight, not a deliberate tactic." The court here in Murray v. Carrier, 91 L. Ed. 2d 397, at 405-406, went on to state that the lack of testimony from Carrier's counsel which might disclose a strategic reason for failing to appeal was absent. To which, it was rendered that the district court resolve the matter upon taking further evidence.

Counsel's trial strategy and/or trial tactic was not binding nor sound, the waiver of Appellant's confrontation right was violated, counsel stipulation was unsupported by fact.

Counsel conceded to the stipulation without consideration to the Lab Report Analysis Result that posits the dispute of the stipulation being set upon misleading facts, as noted in the PSR, an 'unknown' substance. Surely the Probation Officer derived here conclusion that the substance was 'unknown' from a reliable source of information. Considering the substances of counts one and two were in government custody for chemical testing since the arrest of Appellant on August 11, 1988.

Appellant here asserts that counsel's trial strategy and/or trial tactic was unsound. In that, Appellant here meets the limitation test in Billy-Eko, 8 F. 3d 111, 114-115.

Counsel's performances as illustrated here fell below an objective standard of reasonableness, impinging upon Appellant's rights to due process and confrontation of a witness. Sparman v. Edwards, 26 F. S. 2d 450, 463-464 (E.D.N.Y. 1997). The sentence was imposed on misleading facts, inaccurate and groundless information, being unchallenged subjected the matter to an adverse consequence. However, it is recognized that the burden is on the defendant to show the inaccuracy or unreliability of the pre-sentence report. United States v. Gilliam, 987 F. 2d 1009, 1014 (4th Cir. 1993). Counsel was granted an additional opportunity to present a chemist to contest the 'unknown' substance, provided by 18 U.S.C. § 3006A(e)(1), accompanied with the Lab Report Analysis Result. Appellant received no benefit from the stipulation as the government states in the Letter of Response to Appellant's 28 U.S.C. § 2255, the adverse consequence is the sentence Appellant currently serves.

Appellant was sentenced upon groundless information. Roberts v. United States, 63 L. Ed. 2d 622, 445 U.S 552, 100 S. Ct. 1358 (1980). The Supreme Court here held, that the problem of drawing inferences from an ambiguous silence is troubling. As a matter of due process, an offender may not be sentenced on the basis of mistaken facts or unfounded assumptions. id. at 445 U.S. 563 In that the punishment should fit the offender not merely the crime, further noting that the sentencing court has a broad spectrum to extrapolate unlimited information.

The Supreme Court held in United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), due process protects a defendant's right not to be sentenced on the basis of false and invalid information.

Furthermore, ineffectiveness claim are ordinarily inappropiate to raise on direct appeal because they require additional factfinding. Kimmell v. Morrison, 477 U.S. 365, 91 L. Ed. 305, 308 (1986).

Appellant contends here that Appellee's arguments are invalid and record reflects with the nexus of Appellant's argument here now, that counsel's trial strategy and/or trial tactic was unsound. Counsel waiving Appellant's right to confrontation on misleading facts caused errors of constitutional dimensions. For the reasons here noted, Appellant's claims should be deemed de novo and not waived.

POINT THREE

APPELLANT'S CHALLENGE TO HIS CRIMINAL HISTORY CATEGORY IS NOT PROCEDURALLY BARRED AND IS WITH MERIT

Appellant inquired to appellate counsel to the claim here being appealed, counsel informed Appellant that it was not riped for appeal. However, over the years, Appellant's research apprised him that the matter could have been appealed.

The claim here is not waived. "When a defendant elects to challenge one part of a sentencing "package" whose constituent parts are "truly interdependent," review of the entire sentencing package does not constitute a double jeopardy violation." United States v. Mata, 133 F. 3d 200, 201-202 (2d Cir. 1998), (Appellant is not arguing double jeopardy)

Here in the instant case, the claim herewith is opt to be challenged on its merits.

The Second Circuit has recognized that the payment of a twenty-five dollar fine is an infraction, when the sentence imposed is five days or less or a fine. As Appellant illustrates in his Appeal Brief. The United States Sentencing Guidelines, Section 1B1.9 confirms such; Congress mandates the facts here noted for support of Appellant's argument, 18 U.S. C. § 3559(a)(9). The violation does not constitute a term or imprisonment, therefore it is considered an infraction.

Appellant contends that the claims here are valid and the conviction and sentence should be reviewed de novo due to the violations of law and the sentence imposed as a result of an incorrect appplication of the sentencing guidelines. United States v. Ready, 82 F. 2d 551, 555 (2d Cir. 1996), 18 U.S.C. § 3742(a)(1).

The claims here are with merit and should be reviewed de novo.

Appellant here reiterates that he is a pro se litigant and should be held to less stringent standards than an accomplished attorney, in that, the withheld here should be construe more liberally. United States v. Onwubiko, 969 F. 2d 1392, 1397 (2d Cir. 1992).

CONCLUSION

For the reasons hereto submitted, the claims here should be reviewed on their merits and de novo, respectfully remanded to the district court for full factual findings accordingly.

Respectfully submitted,

Mark A. Garnes - Pro Se
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White Deer, Pa.
17887

DATED: April 12th, 2000
White Deer, Pennsylvania

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,
Appellee,

v.

Mark Garnes,
Appellant.

CERTIFICATE OF SERVICE
99-1524

I, Mark Garnes, pro se, hereby certify under the penalty of perjury that on the 14th day of April 2000, I served by United States Mail, certified, the original and ten (10) copies of Appellant's Reply Brief and Appendix to the Deputy Clerk of the Court of Appeals for the Second Circuit and one copy to the Assistant United States Attorney, to the addresses as follows:

MAILED TO:

Mrs. S. Washington-Goeloe
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Mr. Andrew J. Frisch
Assistant United States Attorney
United States District Court
Eastern District of New York
147 Pierrepont Street
Brooklyn, New York 11201

DATED: April 14th, 2000
White Deer, Pennsylvania

Mark A. Garnes - Pro Se
Reg. No. 24646-053
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FCI Allenwood Med.
White Deer, Pa. 17887

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 96 4357
KORMAN, J.
GOLD, M.J.

United States of America,
Plaintiff,

-against-

Mark Garnes,
Defendant.

Docket No. 88 CR 496(S-14)
(ERK)

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MEMORANDUM OF LAW IN SUPPORT
OF MOTION PURSUANT TO 28 U.S.C.
SECTION 2255

As a matter of introduction, the petitioner respectfully submits that the events which transpired in the instant case constitute a right to effective assistance of counsel, protected by the Sixth Amendment of the United States Constitution; a sufficiency of the evidence to establish guilt, proper Base Offense Level and Criminal History Category.

In short, the petitioner respectfully request fact-finding hearings based upon the noted matters herein.

STATEMENT OF ISSUES UNDER CONSIDERATION

The petitioner respectfully request that this Court adjudicate the following issues of law, to wit:

1. The petitioner should receive fact-finding hearings to determine the ineffective assistance of counsel, insufficiency of evidence to establish guilt, improperly imposed enhancement for obstruction of justice by two points to the Criminal History Category and a one point

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Government. U.S. v. Amato, 15 F3d. 230, at 235 (2d. Cir. 1994), and draw reasonable references in the Government's favor. Glasser v. U.S., 315 U.S. 60, at 80, 86 L.Ed.2d. 680, 62 S.Ct. 457 (1942). "The conviction must stand if any rational trier of fact could have found the essential elements of the crime established beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, at 319, 61 L.Ed.2d. 560, 99 S.Ct. 2781 (1979).

Despite this strenuous burden of proof, this Court has emphasized that juries must not be allowed to engage in "false surmise and rank speculation", in arriving at a guilty verdict. U.S. v. Wiley, 846 F.2d. 150, at 155 (2d. Cir. 1988), citing U.S. v. Starr, 816 F.2d. 94, at 99 (2d. Cir. 1987). A conviction may not be based upon evidence that is "at least as consistent with innocence as with guilt", U.S. v. Mankani, 739 F.2d. 538, 547 (2d. Cir. 1984), and "on inferences no more valid than others equally supported by reason and experience", U.S. v. Bufalino, 285 F.2d. 408, at 419 (2d. Cir. 1960); see also, U.S. v. Redwine, 715 F.2d. 315, at 319 (7th Cir. 1983).

Applying these principles, the conviction on 'Count Three' of the indictment should be vacated. The only witness to the point that the petitioner 'used or carried' a weapon was Viola Nichols. No evidence corroborated her testimony, other than the presence of the guns, even there, the witness does not give description notable to what is in the governments's exhibits. (Tr. 97, 111-113)

Due to the insufficiency of the evidence, this Court

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99-1524

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 99-1524

UNITED STATES OF AMERICA,

Appellee,

v.

MARK GARNES,

Defendant-Appellant.

JOINT APPENDIX FOR DEFENDANT-APPELLANT MARK GARNES

Mark A. Garnes
Reg. No. 24646-053
P.O. Box 2000-3B
FCI-Allenwood Med.
White Deer, Pa.
17887

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07BG CLOSED

U.S. District Court
New York Eastern (Brooklyn)

CIVIL DOCKET FOR CASE #: 96-CV-4357

Garnes v. United States
Assigned to: Judge Edward R. Korman
Demand: $0,000
Lead Docket: None
Dkt # in E.D.N.Y. : is 88-CR-496

Filed: 09/04/96
Nature of Suit: 510
Jurisdiction: US Defendant

Cause: 28:2255 Motion to Vacate Sentence

MARK A. GARNES
petitioner

Mark A. Garnes
[COR LD NTC] [PRO SE]
Reg. #24646-053
P.O. Box 2000
White Deer, Pa 17887

V.

UNITED STATES OF AMERICA
respondent

Leslie Ragon Caldwell
(718)330-7014
[COR LD NTC]
United States Attorney's Office
Criminal Division
225 Cadman Plaza East
Brooklyn, NY 11201
(718) 254-7000

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roceedings include all events.
:96cv4357 Garnes v. United States 07BG CLOSED

ARK A. GARNES

petitioner

v.

NITED STATES OF AMERICA

respondent

A02

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roceedings include all events. 07BG
:96cv4357 Garnes v. United States CLOSED

/4/96 1 MOTION by Mark A. Gaines to vacate under 28 U.S.C. 2255, (ml) [EOD 09/26/96]

/4/96 -- Magistrate Gold has been selected by random selection to handle any matters that may be referred in this case. (ml) [EOD 09/26/96]

0/8/96 2 ORDER TO SHOW CAUSE: petitioner is granted leave to proceed in forma pauperis; the U.S. Attorney for the Eastern District of New York as attorney for the respondent, show cause before this Court by filing of a return to the petition why said motion should not be granted; within 60 days of receipt of this order, the U.S. Attorney for the Eastern District of New York shall serve a copy of his return upon the petitioner; petitioner, within 60 days of receipt of a copy of the return shall file a reply, if any; service of a copy of this Order to Show Cause shall be made by the Clerk of this Court by forwarding a copy thereof, together with a copy of the petition, to the AUSA Leslie Caldwell and by mailing a copy of this order to the petitioner. (signed by Judge Edward R. Korman dated 10/2/96) (ajl) [EOD 10/08/96]

2/24/96 3 LETTER dated 12/17/96 from Mark Garnes to Clerk of Court requesting to know the status of his case. (ajl) [EOD 12/24/96]

/19/97 4 LETTER dated 3/13/97 from Mark Garnes to Clerk of Court requesting to be sent a copy of the docket sheet in this matter. (ajl) [EOD 03/19/97]

/31/97 5 LETTER dated 3/21/97 from Mark Garnes to Victor Jong requesting to know the status of his motion for the judgment on the pleadings. (ajl) [EOD 03/31/97]

./28/97 6 LETTER dated 4/21/97 from Mark Gaines to Victor Joe requesting to be sent a copy of the docket sheet. (ajl) [EOD 04/28/97]

5/7/97 7 LETTER dated 5/5/97 from Leslie Caldwell to Judge Korman requesting an extension until 5/30/97 for the Govt to respond to Mr. Garnes' petition. (ajl) [EOD 05/07/97]

5/20/97 8 LETTER dated 5/9/97 from Mark Garnes to Judge Korman requesting the Court to grant the motion for judgement on the Pleadings. (ajl) [EOD 05/20/97]

5/20/97 9 LETTER dated 5/5/97 from AUSA Leslie R. Caldwell to ERK: requesting an extension of time to respond to the petition until 5/30. (jag) [EOD 05/20/97]

A03

/20/97	--	Endorsed order granting govt's request for extension of time and resetting answer due for 5/30/97 for United States. Copy of this order (on docuent #9) sent to both parties. (Signed by Judge Edward R. Korman, dated: 5/7/97) (jag) [EOD 05/20/97]
;/2/97	10	LETTER dated 5/27/97 from Mark Garnes to Aliza Silber requesting to be sent a copy of a docket sheet. (ajl) [EOD 06/02/97]
;/5/97	11	MOTION by Mark A. Garnes for judgment on the pleadings, Motion hearing (ajl) [EOD 06/05/97]
;/5/97	--	Endorsed order denying [11-1] motion for judgment on the pleadings (Signed by Judge Edward R. Korman dated 5/29/97) (ajl) [EOD 06/05/97]
;/18/97	12	LETTER dated 6/16/97 from Mark Garnes to Judge Korman requesting that the Court rule on the motion that is before the Court. (ajl) [EOD 06/18/97]
7/25/97	13	ORDER, endorsed on verified request for default, The motion is denied. (signed by Judge Edward R. Korman dated 7/23/97) (ajl) [EOD 07/25/97]
10/24/97	14	LETTER dated 10/21/97 from Pltf to Clerk; requesting status on case and copy of docket sheet. (ld) [EOD 10/29/97]
12/4/97	15	LETTER dated 11/25/97 from AUSA, Leslie Caldwell, to Judge Korman, stating that the 2255 petition should be dismissed. (mrm) [EOD 12/04/97]
12/4/97	16	LETTER dated 11/29/97 from Mark A. Garnes, to Judge Korman, requesting an extension of time to reply to the Government's Response to the 2255 motion. (mrm) [EOD 12/09/97]
12/18/97	--	Endorsed order on Doc. No. 16 that petitioner may have until 3/1/98 to reply to the Government's response. (Signed by Judge Edward R. Korman, dated 12/11/97). c/m (lgn) [EOD 12/18/97]
12/30/97	17	REPLY MEMORANDUM OF LAW by Mark A. Garnes to respondent's answer. (tdh) [EOD 01/06/98]
12/30/97	18	REPLY by Mark A. Garnes in opposition to Respondent's answer. (mrm) [EOD 02/04/98]
2/4/98	19	ORDER that the U.S. Attorney is directed to discuss the effect of U.S. v. Vasquez, 85F.3d59(2d Cir. 1996) as it relates to petitioner's challenge to his conviction on the 924(c) count. A reply to this request is due within 15 days of the date of this order. (signed by Judge Edward R. Korman, dated 1/29/98) c/m. (mrm) [EOD 02/04/98]

A04

/6/98	20	LETTER dated 2.2.98 from Mark A. Garnes to the Clerk of the Court requesting that a typo error be corrected in view of his reply to the govt's response to his 28 U.S.C. section 2255 petition. (tdh) [EOD 02/09/98]
/19/98	21	LETTER dated 3/18/98 from Leslie R. Caldwell, AUSA, to Judge Korman stating that defendant Mark Garnes' conviction should be vacated. (tj) [EOD 03/19/98]
/26/98	22	ORDER that the petitioner's conviction for using or carrying a firearm is vacated, and the sentence imposed on the remaining counts is vacated for the purpose of resentencing only, and the Probation Dept. is directed to prepare an updated P.S.R. reflecting inter alia, an enhancement for possession of firearm, and the clerk is directed to assign counsel. (Signed by Judge Edward Korman, dtd. 3.18.98). Copies mailed by Chambers. (See copy of letter dtd. 3.18.98 to Judge Korman from AUSA, Leslie R. Caldwell). (tdh) [EOD 03/26/98]
/26/98	--	Case closed. (tdh) [EOD 03/26/98]
:/29/98	23	LETTER dated 4.27.98 from Mark A. Garnes to the Clerk of the Court asking whether counsel has been assigned and also whether an updated P.S.R. has been prepared. (tdh) [EOD 04/30/98]
;/7/98	24	LETTER dated 5.5.98 from PaulaMarie Susi to Mr. Garnes advising him that counsel has been appointed to represent him in resentencing and his counsel will advise Chambers when he is prepared to go forward with resentencing. (tdh) [EOD 05/07/98]
5/3/98	25	MOTION by Mark A. Garnes for a downward departure due to post-conviction rehabilitation. (mrm) [EOD 06/04/98]
7/2/98	26	MOTION by Mark A. Garnes "for an expansion of the record pursuant to Rule 7 of 28 U.S.C. section 2255". NoMotion hearing set. (tdh) [EOD 07/29/98]
8/13/98	28	LETTER dated 8/4/98 from Mark A. Garnes to Clerk of the Court, requesting copy of docket sheet. (copy sent by pro se office) (ld) [EOD 08/13/98]
8/6/99	30	LETTER dated 8.3.99 from Mark A. Garnes to Judge Korman requesting a copy of the sentencing transcripts (re-sentencing) on 7.30.99. (tdh) [EOD 08/20/99]
8/13/99	29	LETTER dated 6/23/99 from AUSA, Andrew Frisch, to Judge Korman, in partial opposition to plaintiff's applcation for a downward departure. (wa) [EOD 08/13/99]

A05

roceedings include all events.
:96cv4357 Garnes v. United States 07BG CLOSED

/16/99 31 LETTER dated 8.18.99 from M. Cecelia Volk to Mark A. Garnes acknowledging receipt of his 8.3.99 letter and advising him that his transcript has been ordered. (tdh) [EOD 08/20/99]

0/28/99 32 LETTER dated 10.25.99 from Mark A. Garnes to Judge Korman requesting an extension of time and also requesting that Mr. Bradley D. Simon be removed as counsel. (tdh) [EOD 11/03/99]

0/28/99 33 LETTER dated 10.25.99 from Mark A. Garnes to Ms. Volk requesting a copy of the docket sheet for this case. Pro Se sent docket sheet. (tdh) [EOD 11/03/99]

1/8/99 34 LETTER dated 11.3.99 from Mark A. Garnes to Mr. Simon advising him that he will be proceeding pro se with his filing brief. (tdh) [EOD 11/09/99]

1/10/99 -- Endorsed order on document #32 that this request should be made to the Court of Appeals. (Signed by Judge Edward R. Korman , on 11/3/99) c/m. (mrm) [EOD 11/10/99]

A06

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(NOTE: Changes identified with asterisks)

IN CLERKS OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ AUG 13 1999 ★
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AMENDED
JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
-vs-
MARK GARNES

(FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987)
CASE NO.: CR-88-496
COUNSEL: BRADLEY SIMON

DATE OF ORIGINAL JUDGMENT: JANUARY 4, 1991

X Direct Motion to District Court Pursuant to: X 2852255, ___ 18§3559(c)(7), or ___ Modification of Restitution Order

THE DEFENDANT:
X was found guilty on count(s) 1,3,4 OF SPSDG INDICTMENT (S-4) after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title/Section	Nature of Offense	Date concluded	Count #
21:846 *	CONSP TO DIST HEROIN	8/11/88	SS1
21:841	POSSESS WITH INTENT TO DIST COCAINE BASE	8/11/88	SS3
18:924(c) *	USE OF FIREARM	8/11/88	SS4

*(**NOTE: Counts sss1 vacated for the purpose of resentencing; Count sss4 vacated pursuant to the 28§2255 ruling (See Bailey v. United States, 116 S. Ct. 501 (1995).)*

The deft is sentenced as provided in pgs. 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The deft has been found not guilty on cts. _____ and is discharged as to such cts.

X Count(s) REMAINING is/are dismissed on motion of A.U.S.A.

IT IS FURTHER ORDERED that the deft shall notify the U.S. attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defts S.S. No. 062-58-4240

Defts D.O.B. 5/15/63

Defts USM No: UNK

Defts residence address:

CUSTODY

JULY 30, 1999
Date of imposition of sentence

Signature of Judicial Officer

EDWARD R. KORMAN, U.S.D.J.
Name/Title of Judicial Officer

A TRUE COPY ATTEST
DATED August 16, 1999
ROBERT C. HEINEMANN
CLERK
BY Florence Ryan
Deputy Clerk

A07

1741

Deft: MARK GARNER Judgment -Page 2 of 4
Case Number: CR-88-496

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

THREE HUNDRED (300) MONTHS*

_____ The Court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the U.S.Marshal.

____ The defendant shall surrender to the U.S.Marshal for this district.
___ at _____ on _____.
___ as notified by the U.S. Marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
___ by _____.
___ as notified by the U.S.Marshal.
___ as notified by the Probation Office.

RETURN

I have executed this judgment as follows: _____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

_____
By Deputy Marshal

A08

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS*.

ADDITIONAL CONDITIONS:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state , or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

__ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

X__ The defendant shall not possess a firearm as defined in 18 U.S.C. Section 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth above.

The defendant shall comply with the standard conditions that have been adopted by this court(set forth below). The defendant shall also comply with the additional conditions set forth above.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substance are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement

A09

STATEMENT OF REASONS

X The Court adopts the factual findings and guideline application in the presentence report.
___ The Court adopts the factual findings and guideline application in the presentence report except:

Guideline Range Determined by the Court

Total Offense Level: 38* (Due to recalculation)

Criminal History Category: V

Imprisonment Range: 360-LIFE*

Supervised Release Range: 5 YRS.

Fine Range: $ 25,000.00. to 4,000,000.00.

X Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Total Amount of Restitution: $_____

___ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. Section 3663(d).

___ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

___ Partial restitution is ordered for the following reason(s):

The sentence departs from the guideline range:

____ Upon motion of the government, as a result of defendant's substantial assistance.

X For the following specific reason(s):

Increase per 2D1.1(b)(1) deleted because it would increase the defts sentence range compared to sentence imposed prior to the §2255 ruling.
The Court further departs for defts exhibited rehabilitation.

A10

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

Mark Garnes,	:	
Plaintiff,	:	
	:	
v.	:	Notice of Appeal
	:	File No. 96-CV-4357(ERK)
United States of America,	:	
Defendant.	:	

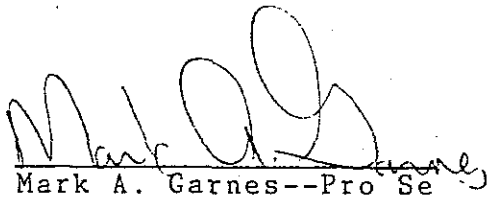
Notice is hereby given that MARK GARNES, plaintiff, hereby appeal to the United States Court of Appeals for the Second Circuit for the final judgement entered in this action on the 30th day of July, 1999.

Mark A. Garnes - Pro Se
Reg. No. 24646-053
100 29th Strret
Brooklyn, New York
11232

DATED: August 3rd, 1999
Brooklyn, New York

Certificate of Service

I, Mark Garnes, hereby certify under the penalty of perjury, pursuant to 28 U.S.C. 1786, that I have forwarded five (5) copies of the Notice of Appeal to the Clerk of the Court for the United State District Court, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, by mailing said document to the Honorable Edward R. Korman, United States District Judge, of the same address. The documents were placed in the mailbox (inmate) here at the Metropolitain Detention Center, 100 29th Street, Brooklyn, New York 11232, on August 4th, 1999.



Mark A. Garnes--Pro Se
Reg. No. 24646-053
100 29th Street
MDC-Brooklyn
Brooklyn, New York
11232

DATED: August 3rd, 1999
Brooklyn, New York

properly when they were test fired in your presence?

A Yes, ma'am.

MS. CALDWELL: Your Honor, at this time the government offers these exhibits subject to connection.

THE COURT: All right. They are admitted subject to connection. Could you read off the numbers on the first group? The last one was 7, 12, 9, 8. The first?

THE WITNESS: 20 and 17.

THE COURT: All right.

THE WITNESS: Do you have the last?

THE COURT: 20 and 17.

(So marked in evidence.)

MS. CALDWELL: Your Honor, I have no further questions of this witness.

THE COURT: Any questions, Mr. Jenks?

MR. JENKS: Yes, Your Honor.

Just one moment, please.

CROSS-EXAMINATION

BY MR. JENKS:

Q Agent Martinez, you are the agent in charge of this investigation and this wiretap?

R. 145

A Yes, sir.

Q You supervised the operation of the other agents and the police officers that were involved in this case?

A To the standpoint of the wiretap, yes, sir.

A13

A Because he brought some to my house once.

Q When you say "he," who are you referring to?

A Country brought to my house.

Q Can you describe what happened when he brought crack to your house?

A He had came to pick up some heroin and he was at my kitchen table and he had two -- two zip lock bags of crack and he had a gun. He took the gun. Put it on the table. And I asked him what was he doing with the crack. And he said because it's for our spot and I have to take it home and put it.

Q Can you describe what the crack that he had looked like?

A It was in little plastic vials with little green tops on them, bluish green tops.

Q You say it was a zip lock bag. Was it a see-through bag?

A Yes.

Q Like a baggy?

A Yes.

Q You say he had a gun. Can you tell the jury what the gun looked like?

A Silver, with wood. I don't know too much about guns.

Q Can you hold up your hands and say about how long the gun was?

R. 146

A About like this.

Q So about seven inches long, approximately?

A I guess so, yes.

A14

took $33,000 from him.

Q Do you know about when that was?

A June or July.

Q Did you ever have any conversations with Brian Gibbs about that money that had been taken from Mark Garnes?

A We did talk about it, yes. But I can't remember the conversation but we did talk about it.

Q Now, you already testified that the time when you saw Mark Garnes with crack at your house he had a gun. Did you ever see him with a gun on any other occasions?

A Yes.

Q What kind of gun did you see him with at other times?

A I saw him with a longer one. And he also brought guns to my house, three.

Q You said that during that time period he was coming to your house on a pretty regular basis.

Did he usually have the gun with him or how often did he have the gun with him?

A Whenever he came.

Q You said that he brought three guns or had three guns. Tell us about that.

R. 147

A Mike Bones was having trouble with some of his -- the people that was working on Lakewood Street about people was coming robbing him of their drugs and their money and he needed some guns, and Country brought the three guns to my house and

he told me to tell Mike to make sure that he take care of one particular gun because that was his personal gun.

Q Did you see at that point which gun he was talking about?

A Yes, I did.

Q Which gun was that?

A It was a longer one, longer one. Longer than the one I described to you before.

Q How did that gun compare with the gun -- let me just rephrase that.

The gun that you saw him with at the time that he had the crack, was that the same or different from the gun that you saw him with the other times?

A It was different.

Q It was different?

A Yes.

Q How did the gun that he said was his personal gun compare with the one that you usually saw him with?

A I think it had like -- it was gold I think. Like gold plated or something like that instead of silver.

Q Was the personal gun, the one he said was his personal gun the same gun or different gun than the one you usually saw him with?

R. 148

A It was a different gun.

Q Now, did you have have any conversation with Mark Garnes about why he carried a gun?

A He said he always carries his gun with him.

Q The three guns that he brought to your house that one time, what happened to those?

A I gave them back to him the next day.

THE COURT: I think the question was, did he ever tell you why he carried the guns?

THE WITNESS: Excuse me.

THE COURT: Did Mark Garnes ever tell you why he carried the guns?

THE WITNESS: To protect himself.

Q Did you see him with a gun when he also had drugs with him?

A Yes.

He had a gun every time he came to my house.

Q All right. Backing up a second. You said that he came and picked up the three guns that he had dropped off.

Had anyone else come and gotten those guns in the meantime?

A No.

Q You testified that you talked on the phone with Brian Gibbs and Mark Garnes. Did you ever talk with them in any unusual way, other than in normal English?

A Yes.

Q Can you tell the jury exactly how you talked to them?

A In Pig Latin.

Q Can you give the jury an example, for example, how you

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	CR-88-00496(S-4)
Plaintiff,	:	
-against-	:	United States Courthouse Brooklyn, New York
MARK GARNES, a/k/a "Country",	:	
Defendant.	:	November 1, 1989 2:00 o'clock p.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government: ANDREW J. MALONEY
United States Attorney
BY: LESLIE R. CALDWELL
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York

For the Defendant: EDWARD P. JENKS, ESQ.

Court Reporter: Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

roceedings recorded by mechanical stenography, transcript
roduced by computer-aided transcription.

A No, I don't.

Q When they searched -- the agents searched him in your presence, correct?

The agents that arrested him, after you placed him under arrest, he was searched right there on the street, was he not?

A Yes.

Q And that was in your presence, right?

A Yes.

Q Did they find any handguns on --

A No.

Q Did they find any knives?

A No.

Q Did they find any drugs?

A No.

Q Did they find any large sums of currency on Mr. Garnes?

A No.

MR. JENKS: All right. I have nothing further.

MS. CALDWELL: Nothing further.

THE COURT: Thank you.

(Witness excused.)

THE COURT: Next.

MS. CALDWELL: The government calls Special Agent Charles Gianturco.

R. 151

THE COURT: Raise your right hand.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - X

UNITED STATES OF AMERICA, : CR-88-00496(S-4)

Plaintiff, :

-against- :

United States Courthouse
Brooklyn, New York

MARK GARNES,
a/k/a "Country", :

November 2, 1989
Defendant. : 10:15 o'clock p.m.

- - - - - - - - - - - - - - X

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government: ANDREW J. MALONEY
United States Attorney
BY: LESLIE R. CALDWELL
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York

For the Defendant: EDWARD P. JENKS, ESQ.

Court Reporter: Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

R. 152

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

A20

A No, it wasn't.

Q Do you know the nature of the charges in that arrest warrant?

A As I recall, there were charges against an individual related to a sale of narcotics.

Q Who was the person who you were executing the arrest warrant for that morning?

A Mark Garnes.

Q Was that arrest warrant to be executed at 2727 Surf Avenue, apartment 528 in Brooklyn, New York?

A Yes, it was.

Q When you got to that location, did you gain access to to the apartment?

A Yes.

THE COURT: Will you come up?

(Side bar follows.)

THE COURT: What is this witness going to testify to?

MS. CALDWELL: That he searched the bedroom and found the guns.

THE COURT: All right.

(In open court.)

THE COURT: Read back the last question and answer.

(Record read.)

R. 153

THE COURT: Did you have an occasion to search that apartment?

A21

THE COURT: Obviously it is not irrelevant.

MS. CALDWELL: It is not cumulative.

THE COURT: It is not necessary.

MS. CALDWELL: What is Your Honor's ruling?

THE COURT: I am not allowing any of it. Let's go.

(In open court.)

MS. CALDWELL: Your Honor, in light of your ruling, we have just some stipulations to read into the record.

THE COURT: Go ahead.

MS. CALDWELL: The first one is marked as Government Exhibit 92. Government Exhibit 92 reads as follows:

It is hereby stipulated and agreed by and among the undersigned counsel for all parties that if Any Siegel were called to testify at the trial of this case, she would testify as follows:

She is employed as sales coordinator of the MobileComm Company, a company which leases beepers and other paging devices. As sales coordinator, Ms. Siegel is a custodian of records of the MobileComm Company.

She's examined the records of the MobileComm Company relating to subscriber information for beeper number (212) 277-5689. Those records include Government Exhibit 91 and are kept in the course of the MobileComm Company's regularly conducted business and it is the regular practice of the MobileComm Company to keep those records.

A22

Those business records marked as Government Exhibit 91 reflect the following.

Between June 3, 1988 and October 18, 1988, the beeper corresponding to telephone number (212) 277-5689 was leased to Tony Garnes, 2727 West 28th Street, Brooklyn, New York.

The government offers Exhibits 91 and 92 in evidence.

MR. JENKS: No objection.

THE COURT: 91 and 92 are in evidence.

(So marked.)

MS. CALDWELL: The next stipulation reads as foIlows:

It is hereby stipulated and agreed by and among the undersigned counsel for all parties that if Maryann Garner were called to testify at the trial of above case she would testify as follows:

She is employed in the Security Department of the New York Telephone Company and is a custodian of records of the New York Telephone Company.

She has examined records of the New York Telephone Company relating to subscriber information for telephone numbers (718) 265-2008, (718) 265-3026, (718) 827-8244 and (718) 322-5127.

Those records are kept in the course of the New York Telephone Company's regularly conducted business and it is the regular practice of the New York Telephone Company to keep those records.

A23

Those business records reflect the following.

During the period of February through June, 1988, telephone number (718) 265-2008, was subscribed to Carmen Ayala, 2727 Surf Avenue, apartment 528, Brooklyn, New York.

During the period June through August, 1988, telephone number (718) 265-3026 was subscribed to Carmen Ayala, 2727 Surf Avenue, apartment 528, Brooklyn, New York.

During the period February through August, 1988, telephone number (718) 827-8244 was subscribed to G. Barfield and billed to D. Gibbs, both at 1266 Sutter Avenue, apartment 4-B, Brooklyn, New York.

During the period February through August, 1988, telephone number (718) 322-5127 was subscribed to Miriam Rodway, 111-32 146th Street, Jamaica, Queens, New York.

Your Honor, I offer Government Exhibit 93 at this time.

MR. JENKS: No objection.

THE COURT: 93 in evidence.

(So marked.)

MS. CALDWELL: The next stipulation relates to the narcotics and reads as follows:

It is hereby stipulated and agreed by and among the undersigned counsel for all parties that if Mohini Motwani were called to testify at the trial of the above case she would testify as follows.

A24

She's a chemist with the New York City Police Department laboratory.

On or about August 25, 1988, she performed laboratory analyses of the contents of Government Exhibits 1, 2, 3, 4, 5 and 6. Based on her analyses, Ms. Motwani reached the following conclusions.

Government Exhibit 1 consists of eight hundred vials, each of which contains cocaine base, also known as crack.

The net weight of Government Exhibit 1 is two and a half ounces, plus 16 grains.

Government Exhibit 2 consists of 526 vials, each of which contains cocaine base, also known as crack. The net weight of Government Exhibit 2 is 1 and 5/8 ounces plus 18 grains.

Government Exhibit 3 consists of one bag, which contains cocaine base, also known as crack. Net weight of Government Exhibit 3 is one ounce plus 51 grains.

Government Exhibit 4 consists of 31 vials, each of which contains cocaine base, also known as crack. The net weight of Government Exhibit 4 is 52 grains.

Government Exhibit 5 consists of 201 vials, each of which contains cocaine base, also known as crack. The net weight of Government Exhibit 5 is 5/8 of an ounce plus 20 grains.

R. 157

Government Exhibit 6 consists of two hundred

A25

envelopes, each of which contains heroin. The net weight of Government Exhibit 6 is 1/8 ounce plus 5 grains.

And finally, Government Exhibit 13 consists of 120 envelopes packed in rice. The 120 envelopes contain heroin. Net weight is the -- excuse me, is the weight of the substance analyzed exclusive of the packaging.

The government rests.

I will offer, I'm sorry, I will offer 94 into evidence.

MR. JENKS: No objection.

THE COURT: 94 in evidence.

(So marked.)

MR. JENKS: May we approach, Your Honor?

THE COURT: Yes.

(Side bar follows.)

MR. JENKS: Your Honor, it might be a good point at this time to take a quick two minute recess. I am going to call one short witness and that should be it.

Also, with respect to the last count against Garnes in the indictment, I'd ask for a Rule 29 judgment of acquittal on using the gun during and in relation to a narcotic trafficking crime.

The only testimony we've had about a gun anywhere has been from Viola Nichols.

R. 158

THE COURT: What does that mean? I don't understand.

A26

If the jury -- am I supposed to conclude that her testimony is inherently incredible? That's for the jury to decide.

MR. JENKS: I make the motion anyway.

THE COURT: I assume it's also directed to all the other counts of the indictment as well?

MR. JENKS: Yes.

THE COURT: Denied.

MR. JENKS: Can we just take a two minute recess?

THE COURT: All right.

(In open court.)

THE COURT: All right. Ladies and gentlemen, we are going to take a short recess. The defense will put on one witness.

(The following occurred in the absence of the jury.)

THE COURT: All right.

(Recess taken.)

(Continued on the next page.)

On the other hand, if you are not satisfied beyond a reasonable doubt that on or about the date alleged in the indictment, Mark Garnes did knowingly and intentionally possess cocaine with the intent to distribute it or that he aided, abetted, counseled, commanded, induced or procured the offense of the crime of possession of cocaine with the intent to distribute it, you should find him not guilty of Count Two.

The third and final count of the indictment reads as follows.

From in or about March, 1988 and continuing until on or about August 11, 1988, both dates being approximate and inclusive, within the Eastern District of New York, the defendant Mark Garnes, also known as "Country," did knowingly and intentionally use and carry a firearm during and in relation to a drug trafficking crime, to wit, the violations set forth in Counts One and Two of this indictment.

Count Three of the indictment charges that from March of 1988 until August 11, within the Eastern District of New York, Mark Garnes did knowingly and willfully use and carry a firearm during and in relation to a drug trafficking crime, namely, the crimes that are charged in Counts One and Two of the indictment. You should consider Count Three only if you have decided to convict Mark Garnes on Count One and Count Two or both. If you find the defendant Mark Garnes is not guilty of Count One and Count Two, you must acquit him of Count

A28

Three.

On the other hand, even if you find that he is guilty of either Count One or Count Two, you must nevertheless satisfy yourself that all of the elements that the government is required to prove in order to warrant a finding of guilty have been proven beyond a reasonable doubt here.

To convict the defendant of Count Three, you must find that the government has proven first that on one or more occasions during the period between March and August of 1988, that is, March to August 11, 1988, Mark Garnes used or carried a firearm.

Second, that Mark Garnes knew that he was using or carrying a firearm.

And third, that Mark Garnes carried or used the firearm during and in relation to the commission of a drug trafficking crime for which he might be prosecuted in a court of the United States.

The first element that the government must proof beyond a reasonable doubt is that Mark Garnes used or carried a firearm on one or more occasions during the period March through August 11, 1988. A firearm means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

R. 161

You should note that in order for the government to prove that Mark Garnes used a firearm, it does not have to

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - X

UNITED STATES OF AMERICA, : CR-88-496

Plaintiff, :

-against- :

United States Courthouse
Brooklyn, New York

MARK GARNES, :

January 4, 1991
Defendant. : 10:30 o'clock a.m.

- - - - - - - - - - - - - X

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: ANDREW J. MALONEY
United States Attorney
BY: LESLIE CALDWELL
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York

For the Defendant: RICHARD LEVITT, ESQ.

Court Reporter: Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

R. 162

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

A30

GR OCR CSR CM

THE CLERK: United States versus Mark Garnes.

MR. LEVITT: Good morning, Your Honor.

THE DEFENDANT: Good morning.

THE COURT: All right. Mr. Garnes, you have gone over the presentence report with your lawyer?

THE DEFENDANT: Yes, I have.

THE COURT: Okay. You have read it?

THE DEFENDANT: Yes.

MR. LEVITT: Judge, we have nothing further specifically with respect to the presentence report, except for those statements made in our letter of October 30 concerning the criminal history category and the possible impact of the government's claims of Mr. Garnes' knowing involvement in two other crimes.

I understand, and --

THE COURT: My inclination, subject to hearing you, is to leave the criminal history where it stands in the presentence report.

MR. LEVITT: All right. The --

THE COURT: I think --

MR. LEVITT: I have nothing further to add.

THE COURT: I think the sentence that will be authorized under the guidelines plus the five year add-on is sufficient, provides me with sufficient discretion and I don't -- at least in terms of an upward. I don't intend to go

up. I don't intend to go down.

MR. LEVITT: All right. That having been said, then I won't further address the arguments that I made in the October 30 letter.

With the Court's permission, I guess we can proceed to the sentencing phase.

THE COURT: Okay.

MR. LEVITT: What's the appropriate order here, Judge? Does the government --

THE COURT: Usually the defendant goes first.

MR. LEVITT: This is -- it's an excruciating sentence from both the defendant's standpoint and also I guess to a -- a lesser degree from the defense lawyer's standpoint. I have come to know Mr. Garnes over the last many months and without -- without question, the person who -- who is depicted in this case, I should say, the depiction of him in the case, in the trial, in the presentence report and I am not referring to anything specifically that's unfair or bad in the report, but the picture that emerges from these things is not a total picture.

Mr. Garnes, as the report states, was the child of a broken home. He obviously had extraordinarily difficult problems growing up, including having been shuffled around from one family to the next and periods of running away.

He strikes me as a bright person. My relationship

with him has been excellent. He has been very cooperative in every way and it's obviously unfortunate that it's come to what it has come to.

I suppose you can say that certain persons with Mr. Garnes' intelligence, notwithstanding the tragedies and the difficulties of their personal background, don't go on to commit the crime that Mr. Garnes has been convicted of.

At the same time, I -- unfortunately a lot of people do get trapped into circumstances and I suppose somewhere there is a large amount of personal responsibility and at least there is some room for understanding. I -- I appeal to the Court's evenhandedness in trying to balance the two.

The sentence which Mr. Garnes will receive if the Court stays within the guidelines even at its lowest point is extraordinarily long. It's 292 months, plus five years consecutive for the gun.

Since the Court has already stated its intention apparently not to deviate from that range, all I can do is appeal to the Court to come in at the bottom and frankly, there is not too much more I can say.

THE COURT: Mr. Garnes, do you wish to speak before I impose sentence?

THE DEFENDANT: Your Honor, I have nothing further to say other than what my attorney already said. I just like to thank you for your patience, that's all.

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MS. CALDWELL: I have nothing to add, Your Honor.

THE COURT: This is an unfortunate case, Mr. Garnes, for a variety of reasons. But in particular because I think you are a very bright and intelligent person. You probably could have made something better of your life than you did. I am going to impose the minimum sentence under the guidelines, which is nonetheless a staggering sentence. I am going to sentence the defendant on Count One to 120 months and five years supervised release. On Count Three, to 292 months and five years of supervised release, to run concurrently with the sentence on Count One.

On Count Four, I impose a period of five years which under the law must run consecutive to the sentence imposed on Counts One and Three.

So that the total sentence is 352 months. I impose a period of supervised release of three years concurrent to the five year supervised release on Counts One and Three.

So that the total period of supervised release is five years.

MR. LEVITT: Thank you, Your Honor.

MS. CALDWELL: Also the special assessment, Your Honor.

THE COURT: Yes. Special assessment of $150.

THE CLERK: Remaining counts?

MS. CALDWELL: Not against him.

A34

THE CLERK: Any underlying indictments?

MS. CALDWELL: No.

MR. LEVITT: No.

THE COURT: All right.

MR. LEVITT: Thank you.

I'm sorry. Mr. Garnes, you understand you have a right to an appeal.

THE DEFENDANT: Yes, I understand.

THE COURT: And we --

MR. LEVITT: We will file it.

THE COURT: If you can't afford to pay the filing fee, I will have -- I will allow it to be filed without the payment of a filing fee.

THE DEFENDANT: Could I ask you one thing? This fine, this has to be paid within a certain amount of time?

THE COURT: The special assessment, it is not a fine.

THE DEFENDANT: All right.

MR. LEVITT: You've about 30 years to pay it.

THE COURT: I don't know how they are collected.

THE DEFENDANT: Okay. I understand. All right. I will discuss it with Mr. Levitt.

MR. LEVITT: I am not sure what the government's vig is on that.

THE DEFENDANT: Okay.

MR. LEVITT: I will talk to you.

A35

MS. CALDWELL: I will move to dismiss the original indictment against Mr. Garnes.

THE COURT: Granted.

(Whereupon this matter was concluded for this date.)

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

Official Court Reporter
U. S. District Court

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	88-CR-496
v.	July 30, 1999
	Brooklyn, New York
MARK GARNES,	
Defendant.	

TRANSCRIPT OF CRIMINAL CAUSE FOR RE-SENTENCING
BEFORE THE HONORABLE EDWARD R. KORMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	ZACHARY W. CARTER, ESQ. UNITED STATES ATTORNEY BY: ANDREW FRISCH, ESQ. ASSISTANT U.S. ATTORNEY 225 Cadman Plaza East Brooklyn, New York 11201
For the Defendant:	BRADLEY SIMON, ESQ.
Audio Operator:	BENARDETTE INFANTAS
Court Transcriber:	LINDA FERRARA TypeWrite Word Processing Service 356 Eltingville Boulevard Staten Island, New York 10312

Proceedings recorded by electronic sound recording, transcript produced by transcription service

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THE CLERK: United States v. Garnes. Your appearances, counsel?

MR. FRISCH: Your Honor, good morning, for the United States, Andrew Frisch.

MR. SIMON: Good morning, Your Honor, Brad Simon on behalf of the defendant, Mark Garnes.

THE COURT: Good morning.

[Pause in proceedings.]

THE COURT: Just wait one second. I was going over the file yesterday and it was not in the regular pile.

[Pause in proceedings.]

THE COURT: All right.

[Pause in proceedings.]

THE COURT: Mr. Garnes, have you had an opportunity to read the presentence report and the supplemental presentence report that's prepared.

THE DEFENDANT: Yes, Your Honor, I have.

THE COURT: All right.

MR. SIMON: Your Honor, if I may just for a moment, I submitted a memorandum on June 17th which I see the Court has.

THE COURT: Right.

MR. SIMON: I would just like to be brief but to reiterate what I stated in that memorandum which is this is, in my opinion, one of the most remarkable sort of

A38

rehabilitation situations that I have ever witnessed. Mr. Garnes, since the time he was sentenced by you ten years ago or almost ten years ago, has made a remarkable transformation and I would submit to the Court that the letters that were written by officials at the institutions where Mr. Garnes was incarcerated or in my view, are rather unprecedented.

And just the entire picture, the extent that Mr. Garnes has not only rehabilitated himself but has taken upon himself to counsel other inmates and to lend his services to the institutions and the various functions and by counseling inmates and help prison officials in various capacities and I believe that if there is ever a case that cries out for a departure under -- for rehabilitation purposes, it is this one.

And I would just remind the Court that Mr. Garnes has been incarcerated for eleven years and I would submit to the Court that that is an extremely long time and I really see no purpose in where I would ask the Court to consider that fact in evaluating our motion for a downward departure. Eleven years is a long time and Mr. Garnes has made good use of that time and has completely turned his life around. And I would ask the Court to evaluate that and to consider a downward departure and which would entail a sentence of time served.

Oh, by the -- also, I would like to briefly address

the -- I submitted a letter a few days ago addressing the Government's submission of a few weeks ago and I would just point out to the Court that almost all of the so-called infractions that the Government is referring to occurred prior to sentencing and my -- the whole point of my departure motion is that since the time of sentencing, eight and a half years ago, Mr. Garnes has basically had an exemplary record and two infractions over eight and a half years, I submit, is really remarkable.

That it is -- I would submit to the Court that it is impossible to -- virtually impossible for an inmate to exist in the -- in an incarcerated situation without, you know, some sort of an infraction over a decade and the fact that there are only two and one simply involved possession of an unauthorized item, I think, if anything, his record regarding infractions supports my position that his rehabilitation has been extraordinary. And based on this submission that I prepared for the Court, I would ask the Court to consider the downward departure motion.

[Pause in proceedings.]

THE COURT: Do you wish to speak, Mr. Garnes?

THE DEFENDANT: Yes, Your Honor. When this case initially started, Your Honor, I was somewhat -- what was outlined in the PSR was, I was somewhat dysfunctional, disoriented in regards to life about my values for life were

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there for me to do in my life? I mean, for me to go back into the prison system, I mean, yes, I could continue on doing what I've been doing. At one time, I didn't know whether I was going to come home at thirty-one or fifty-one or somewhere in between there but I said I might as well prepare myself and gain as much information to prepare myself for employment. And this is what this information, this education has did for me through the course of the years.

MR. FRISCH: Your Honor, I will rely on the Government's letter of June 23rd, while Mr. Garnes's conduct to some extent and what he says today is commendable, it is simply not remarkable or extraordinary within the meaning of the case law which I have set forth in the letter.

Also, notwithstanding Mr. Garnes's remarks today, this is a very, very serious criminal conduct and even today, and even given the time that he has been in New York awaiting resentencing, there still has not been an expression of acceptance of responsibility for what he did, any remorse for the serious criminal conduct that he committed and while that may be present somewhere in Mr. Garnes, one would think in a motion of this type and given Mr. Garnes's opportunity to speak to the Court directly today, it would have been forthcoming up until this moment. It hasn't and that is somewhat troubling.

But to even put that aside, however commendable Mr.

Garnes's efforts are, the cases talk about heartland rehabilitation and the facts don't justify that what we have here is anything other than heartland rehabilitation. I might add, Your Honor, that the Government does not oppose an eighth month downward departure so that he is resentence to the same sentence which Your Honor previously imposed because of the vacation of sentence he now faces a higher sentence than the one you initially imposed. The Government does not oppose a downward departure to get him back to square one, that is the sentence originally imposed.

MR. SIMON: Your Honor, I would disagree with the Government's assessment -- evaluation of the cases on this -- in this area. I would submit to the Court that as cited in my memorandum, Mr. Garnes's rehabilitation is more extraordinary than the cases in core and the other often cited rehabilitation cases. The Court's in those cases downwardly departed under extraordinary circumstances, under facts that were -- that in my opinion, were far less compelling than we have here.

[Pause in proceedings.]

MR. SIMON: And again, I would remind the Court that Mr. Garnes has already served an extraordinary long sentence.

[Pause in proceedings.]

MR. SIMON: Your Honor, Mr. Garnes's fiancee and son are in the Courtroom and they would like an opportunity to

address the Court if that is okay with Your Honor.

THE COURT: Okay.

THE CLERK: State your name for the record, ma'am.

MS. KRISHNAF: Good morning, Doctor -- Judge Korman. I am Camille Krishnaf and I've been in Mark's company for quite some time now and I must tell you, since Mark's relocation to Brooklyn, I have been able to be in touch with him on a more frequent basis and it is somewhat of a metamorphosis in terms of his outlook on life, you know, in terms of understanding that yes, he did wrong and really understanding what it takes to correct those wrongs and continue to contribute to our community, our society, and really there -- Judge Korman, I am requesting that really you show some mercy to Mark. He has truly rehabilitated himself over the eleven years that he has been incarcerated.

THE COURT: All right, who wants to speak?

MR. SIMON: Mr. Garnes's son is also here and he would like to say a few words, Your Honor.

THE CLERK: State your name for the record.

MR. WESTER: Saquer Wester. All right, what I have to say about my father is you know, he guided me through my whole life. He still is there even though, you know, he was put away but he got me through my whole life and even though my mother -- she didn't push me, you know, enough in school and stuff, she didn't really push me to, you know, strive real

A44

high, it was my father because, you know, he always taught me right from wrong. And he always taught me how to get jobs and everything, you know? And he been there for me, you know, still. You know, he always find a way to keep in contact with me and everything. He never lost me, you know?

And so, I think that if he was out, you know, it even be better for me but because of him, I never been arrested, never been suspended from school, you know, never. I've never been in a precinct or anything, you know? I'm a senior now in high school and I'm planning on graduating, you know, all because of him because he the one that pushed me up there, you know? Let me know that I had to learn from his mistakes and go on and that is what I am doing right now.

[Pause in proceedings.]

THE COURT: All right, first I am going to begin the -- I am going to depart first to the 352 months. I mean, that's where we start in terms of what the guidelines are because I don't think he should be in any worse position now than he was before he made -- successfully made his motion to vacate the sentence.

I am going to downwardly depart and sentence the defendant to the custody of the Attorney General for a period of three hundred months, a period of five years supervised -- what supervised release did I give the last time?

MR. FRISCH: I think it is five years, Judge.

A45

THE COURT: Five years supervised release and the special assessment is what?

MR. FRISCH: It is a total of $100.00.

THE COURT: $100.00. I think you've made progress in jail and sometimes jail helps people find themselves who have engaged in lawless conduct but even when there is a ground for a downward departure, I still have to take into account where we are starting from. In a sense, we're starting from a guideline range here really of 360 months to life. That is what the sentencing commission thought was an appropriate sentence and even where there is a basis for a downward departure, a Judge still has to take into account the seriousness of the offense as reflected -- as the guidelines reflect them and the need to impose a sentence that will operate to deter others and is reasonably just under the circumstances.

Now, I know I have -- I have always been troubled by whether the fluke that you're able to be here for resentencing that has occurred here should, I think -- it's almost -- although I have the power, it almost undermines the purpose of the guidelines just because of the fluke, the purpose for uniformity in sentencing, because of the fluke that results in why you are here to begin with.

Nevertheless, because I think you've shown some effort at rehabilitation that you are entitled to some

A46

downward departure from what the guidelines would otherwise be and so, I am going down to three hundred months for that reason. I think it takes into account your -- the efforts that you've made but also takes into account the other factors that I think a Judge has to take into account in sentencing.

All right, you have a right to an appeal. If I have made any legal error in imposing sentence and if you can't afford to pay the filing fee, I would allow you file the notice of appeal without doing so.

MR. SIMON: Thank you.

MR. FRISCH: Your Honor, if I could ask you to sign the writ for the Marshals?

* * * * * *

* * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Linda Ferrara

LINDA FERRARA

Dated: August 29, 1999

A48

FOR THE STERN DISTRICT OF NEW YORK

NITED STATES OF AMERICA)
)
v.) Docket No. 88-CR-496-(S-4)-1
)
ARK GARNES)
)

PRESENTENCE REPORT

epared for: The Honorable Edward R. Korman
U. S. District Judge

epared by: Eileen Kelly
U. S. Probation Officer

ntencing Date: January 25, 1990

fense: 21 USC 846, Conspiracy to Distribute Heroin, a Class C Felony. 21 USC 841(a)(1), Possession with Intent to Distribute in excess of 50 grams of Cocaine Base, a Class A Felony. 18 USC 924(c)(1), Use of a Firearm During and in Relation to Drug Trafficking, a Class D Felony.

lease Status: In custody since August 11, 1988.

entifying Data:

e of Birth: 5/15/63 (age 26)
ial Security Number: 062-58-4240
ress: 1355 Pacific Street
Brooklyn, New York 11216

ainers: None

efendants: Brian Gibbs - 88-CR-496(S-9)-001

R. 180

stant U.S. Attorney:

lie Caldwell, Esq.

Defense Attorney

Edward P. Jenks, Esq.
297 Mineola Blvd.
Mineola, New York 11501
(516) 741-2920

original report prepared: December 4, 1989
sed (XXS/NO) Date:
ndum (YES/XO) Date: January 11, 1990

JAN 10 9 A4

PET.'S Ex. 2

NEW YORK

OSITION: Ct. 1 – CAG 120 mo. 5 yrs Sup Rel
Ct. 3 - CAG 292 mo. 5 yrs Sup Rel
Ct. 4 – CAG – 5 yrs to run Consecutive to Cts 1+3 plus 5 yrs to run Concurrently
1/4/91

11. Agents have reported that based upon intercepted wire communications, Gibbs' sub-organization distributed approximately 3 - 4 oz. of heroin per week during a six month period (2/88 - 8/88), a total of 2.2 kilograms by conservative estimates. Gibbs purchased these drugs from Lorenzo Nichols' organization, as Nichols was his only supplier. Reportedly, he would purchase the drugs or receive them as his salary, cut them with cutting agents, have them packaged by Viola Nichols, and then have them distributed. The two main people who reportedly worked for Gibbs as lieutenants in his operation, were Herman Brothers, a fugitive, and the defendant Mark Garnes, his step-brother.

12. Upon a search of Gibbs' apartment, agents seized drug records, numerous empty crack vials and 1 starter pistol. At the apartment of Mark Garnes (whom agents describe as a subordinate to Gibbs in the organization), agents seized a number of items which included two (2) .44 caliber pistols, two (2) .357 magnums, two (2) 9mm pistols, ammunition for all of these weapons, 1326 vials containing an unknown substance, 40 small plastic bags containing an unknown subtance and 232 vials containing crack. The total amount of cocaine base seized was 166.1 grams, which is equivalent to 3,220 grams of heroin. Hence, the total weight of heroin, conversions, is 5,420 kilograms.

13. Informant information reveals that Mark Garnes regularly carried guns, and, in fact, during the commission of this offense, on May 12, 1988, was arrested in possession of a .45 caliber automatic. Based on the finding that the car in which he was stopped and arrested, was stopped without cause, this case was subsequently dismissed.

14. Informant information depicts Garnes as a distributor of heroin and crack, working under co-defendant Brian Gibbs, his step-brother. It has further been reported that he and Herman Brothers would cut down all of the Gibbs' organization's heroin and crack have Viola Nichols package it, pay her accordingly, and then distribute it through street workers.

15. Informant information has also revealed that Mark Garnes was the driver of the car in an incident related to the shooting of two individuals, namely Regina Brown, and Myrtle Horshan (AKA "Myersha"). Horshan died as a result of the shooting. This incident reportedly occurred on December 20, 1987, in Myrtle Horshan's car. Lorenzo Nichols has recently pleaded guilty to this murder, as it was he who ordered his former girlfriend Horshan's death, as a result of her shorting him money. This killing, and the wounding of Regina Brown, who has recovered, took place in front of Myrtle Horshan and Lorenzo Nichols' two year old child, "T.C.".

ASO

EDWARD P. JENKS
ATTORNEY AT LAW
297 MINEOLA BOULEVARD
MINEOLA, NEW YORK 11501

516-741-2020

January 2, 1990

Ms. Eileen Kelly
United States Probation Officer
75 Clinton Street, Room 412
Brooklyn, New York 11201-4201

Re: U.S.A. vs. Mark Garnes
88-CR-496 (S-4)

Dear Ms. Kelly:

Pursuant to local rule and guidelines 6A1.2 and 6A 1.3 of the Sentencing Guideline Manual, enclosed in order of the presentence report are defendant Garnes' exceptions and objections to the report. Please excuse any delay since the report did not arrive in my office until December 21, 1989, two holidays intervened, and the defendant is housed in Otisville which made discussion of this report difficult.

PART A. THE OFFENSE

Under paragraph 11 on page 4 of the report, defendant Garnes takes exception to his being called a "lieutenant" under co-defendant Brian Gibbs.

Under paragraph 13 on page 4 of the report, defendant Garnes denies he regularly carried guns. In fact, it should be reported that the only testimony at trial showing that defendant Garnes regularly carried guns was from Viola Nichols, a cooperating convicted felon. Further, the arrest of May 12, 1988 in the State Court, Kings County, charged the defendant with the crime of criminal possession of a weapon in the third degree, a Class D Felony. Upon review of that file, defendant Garnes never had physical possession of the weapon recovered from the gypsy cab. The hand gun was found under the seat. No weapon was found on Garnes or his co-defendant in that case.

Pursuant to paragraph 14 on page 4 of the report, defendant Garnes denies "cutting down" any heroin for the Gibbs' organization.

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Pursuant to paragraph 15 on page 4 of the report, defendant Garnes vehemently denies being involved in the shootings of Regina Brown, and Myrtle Horshan. Defendant Garnes was not involved in this incident and has no knowledge of the facts.

Pursuant to paragraph 16 on page 5 of the report, defendant Garnes denies attempting to "obstruct justice" and denies offering Brian Gibbs money to change his testimony. Any letter writing in this instance by defendant Garnes was not designed to obstruct justice.

Pursuant to paragraph 17 on page 5 of the report, Mark Garnes did not testify; he has the right to remain silent since the Burden of Proof rests on the government Further, the defendant contends that Carmen Ayala did not perjure herself at trial.

Defendant objects to paragraph 18 on page 5.

While defendant does not except to the base offense level of 34 for Count 1 and Count 3, the defendant excepts to paragraph 24 on page 5 adding a +2 for an obstruction of justice for reasons cited earlier. The defendant objects and excepts to an adjusted offense level in paragraph 25 on page 6 of 36.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Pursuant to paragraph 42 on page 7 of the report, the defendant Mark Garnes cannot properly except or object to a criminal history score of 10 placing him in category 5. Counsel must investigate the defendant's prior criminal history status, and therefore, reserves with the Court the right to make further objections.

Pursuant to paragraph 43 on page 8 of the report, Mark Garnes denies involvement or knowledge. Paragraph 44 on page 8 has been addressed earlier in this letter.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

S U M M A R Y O R D E R

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29th day of June, two thousand.

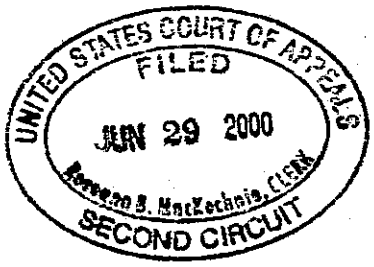
Present: HONORABLE RALPH K. WINTER,

Chief Judge,

HONORABLE AMALYA L. KEARSE,

HONORABLE ROSEMARY S. POOLER,

Circuit Judges.



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UNITED STATES OF AMERICA,

Appellee,

- v. - No. 99-1524

AMOS, C.O. #1535, LOUISE COLEMAN, CAROL CRAFT, MARTHA CRAFT, CHAR T. DAVIS, MAN SING ENG, HOWARD MASON, BRIAN GIBBS, CLAUDIA MASON, IDA NICHOLS, JOANNE MCCLINTON NICHOLS, VIOLA NICHOLS, JOSEPH ROGERS, KAROLYN TYSON, WILSON SKINNER, MARCIA NICHOLS WILLIAMS, PARIS WILLIAMS,

Defendants,

MARK GARNES,

Defendant-Appellant.

- -

Appearing for Appellant: Mark A. Garnes, pro se, White Deer, Pennsylvania.

Appearing for Appellee: Loretta E. Lynch, United States Attorney, Eastern District of New York (Emily Berger, Andrew Frisch, Assistant United States Attorneys, of counsel), Brooklyn, New York.

On Appeal from the Eastern District of New York (Korman, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Mark Garnes appeals from an amended judgment entered by Judge Korman granting in part and denying in part appellant's petition for a writ of habeas corpus under 28 U.S.C. § 2255. Appellant was originally convicted after a jury trial of conspiracy to distribute heroin in violation of 21 U.S.C. § 846, possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and a firearms offense in violation of 18 U.S.C. § 924(c). The district court granted appellant's habeas corpus petition in part and vacated the firearms conviction. Appellant argues that his conviction for the drug offenses was tainted by spillover prejudice from the evidence introduced on the invalidated firearms count, that he was denied effective assistance of counsel at trial and sentencing, and that the district court erred in calculating his criminal history category at resentencing. We affirm.

"In evaluating a claim of prejudicial spillover of evidence

from an invalidated count, ... [we] routine[ly] . . . look to the strength of the government's case on the counts in question." United States v. Rooney, 37 F.3d 847, 855-56 (2d Cir. 1994). In the instant case, the jury heard direct testimony and 34 intercepted phone calls implicating appellant and had before it a large amount of drugs and cash seized from his person at the airport. In light of the volume of evidence establishing appellant's guilt on the drug counts, there is no likelihood that the jury's convictions on those counts was caused by spillover prejudice from the evidence on the firearms count.

Appellant also claims that his trial counsel was ineffective in agreeing to factual stipulations and that his counsel at sentencing was ineffective in failing to object to the quantity of drugs involved. To the extent that appellant's first claim challenges the merits of his trial counsel's decision to agree to stipulations, his claim is procedurally barred because he was represented by new counsel on direct appeal and this claim can be evaluated solely on the record. See Billy-Eko v. United States, 8 F.3d 111, 114-16 (2d Cir. 1993), superseded by statute on other grounds as recognized in Triestman v. United States, 124 F.3d 361, 369 n.8 (2d Cir. 1997). However, appellant alleges in part that he never gave informed consent to his counsel to agree to the stipulations, a claim that requires evidentiary support beyond the record. But appellant has produced no evidence -- not even his own affidavit -- to support his claim. Moreover, nothing in the record suggests that the decision by appellant's

counsel to make the factual stipulations at issue in any way prejudiced his case. Appellant has thus failed to meet his burden under both prongs of the Strickland test. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that finding of ineffective assistance requires proof that counsel's representation fell below objective standard of reasonableness and prejudiced defense); cf. United States v. Plitman, 194 F.3d 59, 64 (2d Cir. 1999) ("[D]efense counsel may waive a defendant's Sixth Amendment right to confrontation where the decision is one of trial tactics or strategy that might be considered sound.").

Appellant's second claim of ineffective assistance also fails under both prongs of Strickland. See Strickland, 466 U.S. at 687. Appellant argues that his counsel at sentencing should have challenged the quantity of drugs seized. However, the government had in its custody 1326 vials of crack and 40 bags of heroin, so counsel's failure to object was objectively reasonable and could not have prejudiced the defense.

Finally, appellant claims that his criminal history category should not have been enhanced because of his prior fine for possessing marijuana. The criminal history point was correctly added, however, because the fine constitutes a "prior sentence" under Guideline Sections 4A1.1(c) and 4A1.2(a)(1), and marijuana possession is not one of the petty offenses listed as exempt from criminal history point calculations under Guideline Section 4A1.2(c). See U.S. Sentencing Guidelines Manual, §§ 4A1.1(c), 4A1.2(a)(1), 4A1.2(c).

We therefore affirm.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk

Richard Alcantore 6/29/00
By: Date

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MARK GARNES,	:	
Plaintiff	:	
	:	
v.	:	**Civil No. 1:CV-00-0700**
	:	**(Caldwell, J.)**
JANET RENO, et al.,	:	
Defendants	:	

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on May 29, 2001, she served a copy of the attached

RECORD TO BRIEF IN SUPPORT OF THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Harrisburg, Pennsylvania.

Addressee:

Mark Garnes
Reg. No. 24646-053
FCI Ft. Dix West
P.O. Box 7000
Unit 5811
Ft. Dix, N.J. 08640

Shelley L. Grant

SHELLEY L. GRANT
Paralegal Specialist